Money in the Law
National and International

A COMPARATIVE STUDY IN THE BORDERLINE OF LAW AND ECONOMICS

A completely revised edition of "Money in the Law"

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Reg. F.E.E-28.467

Brooklyn
THE FOUNDATION PRESS, INC.
1950

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PREFACE

THE PRESENT VOLUME, as its title indicates, is more than a revised edition of my "Money in the Law" published in 1939. Though based on the earlier work it is practically a new book. The main renovation consists in the increased emphasis upon the international ramifications of the subject. This change required a thorough-going reorganization of the volume which is now divided into two Books, the first dealing with the law of money in general, and the second with its international aspects. The volume's new title suggests the new arrangement. Fresh research has been included, far exceeding the routine supplementation of material, and new topics have been added. The legal history of American currency has received a separate treatment as an Annex to the two Books, an arrangement which does greater justice to this truly fascinating subject than did the former incidental references.

Habent sua fata libelli. In 1920 the author embarked upon the study of monetary law when the German post-war inflation gave rise to its first legal problems. The precipitous progress of the inflation, and the sudden turn, in November, 1923, to stringent deflation, multiplied legal disturbances. Step by step their investigation led to the conviction that an adequate discussion of the problems involved required the elaboration of a general legal theory of money on a broad comparative and historical basis. Such a theory was submitted to the public in *"Das Geld in Theorie und Praxis des Deutschen und Ausländischen Rechts"* (Money in the Theory and Practice of German and Foreign Law), published in 1925. Before long the monetary crisis spread all over the world and various implementations of the 1925 volume proved necessary. However I was somewhat handicapped by the fact that the material available in Germany allowed only a meager consideration of the English and American experiences. Paradoxically, it was the Hitler government which took the first step toward widening my field of research by removing me from the Berlin Law Faculty and making life in Germany impossible for me. This action was soon followed by Columbia University's generous invitation to teach here. Thus I was enabled to make a fresh start. It so happened that grave legal problems of a monetary character appeared when I came to this country in 1934. Especially, I had the opportunity to participate in the discussion

of the formidable Gold Clause cases then pending in the Supreme Court. Thereafter I tried my hand at some other legal aspects of the American monetary situation until the aid of the Columbia Council for Research in the Social Sciences permitted me to publish the 1939 volume. That book was primarily based on Anglo-American law without abandoning the results of my earlier studies. The reasons why the volume had to be re-written are indicated above. Again, thanks to the Columbia Council, I could complete the work. I wish to assure the Council as well as the reader, that this version will be final.

There is hardly a theme in legal and economic science which attracts the searching mind as much as does the subject of money. More than a hundred years ago, F. C. von Savigny, the great jurist, pointed to "the almost mysterious nature by which money differs from other things"—a notion that also appears in modern Anglo-American thought.[1] Legal science is called upon to participate prominently in the scrutiny of this great problem; in fact, money has become the main instrumentality of legal transactions since man has advanced beyond the barter economy. That scrutiny can be carried out successfully only on a comparative basis. Monetary law offers an unusual and probably unique opportunity for comparative treatment because the fundamental problems which it raises for lawgivers and courts are largely identical everywhere in modern civilization. It was therefore possible to integrate the monetary laws of the more important countries into a unified picture. The varieties of municipal laws have by no means been overlooked. As a matter of fact, their critical analysis is indispensable for obtaining a theory of more than local validity. Besides other elements, the ideas of justice and fairness must be resorted to in that analysis.

Here we touch upon an intriguing problem which in the course of time has thrust itself more and more upon my study. Monetary decisions of highest Appellate Courts are often destined to influence profoundly the whole economic system, thereby greatly affecting the interests of foreigners. In this situation the question frequently arises whether an opinion of a court, though ostensibly proceeding on an objective legal theory, in reality means a discrimination against foreign creditors or debtors. It is here where comparative analysis proves most fruitful, owing to the similarity of fact situations. Unfortunately the results are disappointing.

1. *Infra*, p. 2, n. 2.

The highest courts of the countries under consideration have far too often sadly failed on this score.[2] Apparently we are confronted with an immanent limitation of judicial objectivity. Patriotism, perhaps patriotism misunderstood, may conflict with the exigencies of straightforward legal thinking. This dilemma must be faced frankly—its implications in the field of international relations are obvious. Legal science has generally lived up better to the canons of impartial justice. The difference in attitude is most striking in France where the nationalist course of the judiciary, which was extreme indeed, has met with much opposition by writers.

To some extent the law itself provides an outlet for the need to protect the paramount interests of the country to which the court belongs. Under the doctrine of public policy (*ordre public*) the court may refuse the application of foreign laws applicable under general Conflict rules, wherever such application would be incompatible with vital principles of the domestic law. The effect of this doctrine, which is well settled in all continental countries, is limited; in no way does it permit, for example, discrimination against a foreign party. But it satisfies all legitimate purposes; in fact, it is a wise and morally unobjectionable compromise. Unfortunately, English, and to a lesser extent, American courts, are unwilling to use the public policy concept on the ground that it infuses quasi-political elements into judicial reasoning. The *pro* and *contra* can scarcely be decided by way of abstract reasoning. The method of examining actual cases is more propitious—and there is no better testing ground in this respect than the law of money because of its importance and its manifold international bearings. The outcome of the examination is unmistakable. Courts afraid of the "public policy" argument nevertheless feel the necessity not to apply the foreign law contrary to vital national interests. In order to arrive at the desired result they will then employ utterly specious arguments or pretexts. Great damage to the prestige of the courts is the inevitable result. Insincerity though subconscious is far too high a price for shunning the public policy principle. One will find in this volume a number

2. See regarding Austria *infra*, pp. 260, n. 65, 480; Belgium p. 271; Canada p. 393; Czechoslovakia p. 245; England pp. 386, 426, 438; France pp. 262 ff., 398 ff., 237, 238, 242; Germany pp. 241, n. 16, 357, 420; Italy p. 261; Netherlands p. 430; Norway p. 432, n. 78; Sweden p. 246 n. 35; United States pp. 435, 395. The fact that a country is not mentioned here means only that the writer has not known of pertinent cases in the monetary field.

of characteristic instances, but the reader's attention may be directed especially to the decision of the House of Lords in *New Brunswick Ry. Co. v. British and French Trust Corp., Ltd.* That case brings home blatantly the faultiness and futility of the prevailing English doctrine.

The relationship of legal and economic inquiry is another point of general significance to the present study. The economic material found in the present volume has not been included for its own sake, but for the purpose of legal analysis. Its treatment therefore differs from the one employed by economists. The issue of method has been brought into focus by an economist reviewer of my 1939 publication.[3] He points out that there are different types of property, having different degrees of "moneyness, varying along a nearly continuous scale," and he considers it unfortunate that I have "tried to establish a difference of kind rather than of degree, between money and non-money." The reviewer illustrates his thesis by asserting that there is no basic difference between bank notes and bankers' records on bank accounts. The latter assertion, examined below in the section on bank deposits,[4] is certainly unfounded, but this fact does not affect the significance of the reviewer's general thesis. There is, one must admit, an almost continuous scale of things having different degrees of "moneyness." Still, a court confronted with litigation on the meaning of the term "money" in a contract, will, statute, etc., has to say definitely whether the thing under inquiry is or is not "money." The court and, generally speaking the jurist, is compelled to weigh, in the light of legal theory, the elements of "moneyness" involved in the particular thing, and to give an affirmative or negative answer according to whether the essential elements of what is generally called "money" are or are not present in the situation at hand. The example is typical. Again and again the legal analyst is compelled to establish logical contrasts whereas the economist or sociologist may well proceed for the purpose of his analysis on the assumption of a continuous scale of elements gradually shading off into each other. Each method has its relative validity.

While the priority of the economic approach in matters monetary should not be questioned, it is believed that the juristic treatment contributes in various ways to a better understanding of that difficult subject also from the viewpoint of the economist. It is true that legal studies frequently suffer from unfamiliarity

3. 7 University of Chicago Law Review 195 (1940).
4. P. 108.

with the economic background of the law, but on the other hand the neglect of the legal material has also often impaired economic analysis even where undertaken by outstanding writers. A number of instances will appear as we proceed in our discussion. Separation of economic and legal thought is too rigorous in Anglo-American learning. The reasons are mainly historical; we are confronted with a heritage of the classical school of economics. In our day a closer cooperation between economists and jurists would certainly be desirable—in fact, it was recommended several decades ago by no less an authority than Alfred Marshall.[5]

NEW YORK,
JANUARY, 1950.

ARTHUR NUSSBAUM

5. *Principles of Economics* (8th ed. 1946), Appendix, "The Growth of Economic Science" p. 768n.

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NOTE ON ABBREVIATIONS

For the Common Law cases (United States and British Empire jurisdictions) the conventional abbreviations have been used. They may be found, *e. g.*, in:

Beardsley & Orman, *Legal Bibliography and the Use of Law Books* (2nd ed. 1947) Appendix X Abbeviations

Black's *Law Dictionary* (3rd ed., 1933), Table of Abbreviations

Bouvier's *Law Dictionary* sub. tit. *Abbreviations*

Hicks, *Materials and Methods of Legal Research* (3rd ed. 1942)

Some cursory information may be offered here to readers to whom these works are not available. Decisions of the Supreme Court of the the United States are cited from the United States Reports (U.S.) and, where possible, from the Supreme Court Reporter (S.Ct.) and the Lawyers Edition Supreme Court Reports (L.Ed.). Decisions of the lower federal courts are cited from the Federal Reporter (F. second series cited as F.2d), the Federal Supplement (F.Supp.) and the earlier) Federal Cases (Fed.Cas.); the name of the Court is added, *e. g.*, C.C.A.2d, meaning Circuit Court of Appeals, 2d Circuit, or N.Y.S.D. meaning District Court of New York Southern District. Decisions of state courts are cited from the official Reports (*e. g.* Ky. meaning official Reports of Kentucky) as well as from the National Reporter System, viz. A. (Atlantic), N.Y.Supp. (New York Supplement), N.E. (North Eastern), N.W. (North Western), P. (Pacific), So. (Southern), S.E. (South Eastern), S.W. (South Western). A.L.R. means American Law Reports. Federal enactments are from the Statutes at Large (Stat.) and the United States Code (U.S.C.). English cases are cited from the official Law Reports, viz. Appeal Cases (A.C.), Ch. (Chancery), King's Bench (K.B.), Queen's Bench (Q.B.) and Probate (P.) with the year placed first in brackets. Early cases are cited from the original source in the customary abbreviation and in addition from the more easily accessible English Reports—Full Reprint [Eng.Rep.]. All E. R. means All English Law Reports.

Furthermore, the following abbreviations have been employed in this volume:

1. App. - - - - - - *Appellate court*
2. Bull.I.I.I. - - - - - *Bulletin de l'Institut Intermédiaire International* (until 1933)
   Bulletin de l'Institut Juridique International (since 1934)

3. Cass. - - - - - - Court of Cassation; if used without other indication, the French *Cour de Cassation*
4. D.H. - - - - - - Dalloz, *Recueil Hebdomadaire de Jurisprudence*
5. D.P. (up to 1923) - - Dalloz, *Jurisprudence Générale, Recueil Periodique et Critique de Jurisprudence*
   (since 1924) - - Dalloz, *Recueil Periodique et Critique de Jurisprudence*
6. J.D.Int. - - - - - - *Journal du Droit International* (Clunet)
7. J.W. - - - - - - - *Juristische Wochenschrift*
8. R.D.Comm. - - - - *Rivista del Diritto Commerciale*
9. R.G.B1. - - - - - - *Reichsgesetzblatt*
10. R.G.Z. - - - - - - - *Entscheidungen des Reichsgerichts in Zivilsachen*
11. Sirey - - - - - - - *Recueil Général des Lois et des Arrêts*
12. Z.A.I.P. - - - - - - *Zeitschrift fur Ausländisches und Internationales Privatrecht*

†

MONEY IN THE LAW

National and International

Book One

THE LAW OF MONEY IN GENERAL[1]

Chapter 1

SPECIFIC MONEY (COINS AND PAPER MONEY)

Section 1

THE CONCEPT OF MONEY [1]

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I. The Metallistic Doctrine

In the social sciences it is a familiar experience that a phenomenon commonly considered as plain and distinct, on closer analy-

1. On the questions discussed in secs. 1 and 2 see Mann, *The Legal Aspect of Money* (1938); Helfferich, *Das Geld* (2d. ed., 1923; English tr. by Infield, 1927); Wolff, "Das Geld" in *Ehrenbergs Handbuch des Handelsrechts* IV Part 1 (1917) 563; Ascarelli, *La Moneta* (1928, with remarkable historical introduction); Mater, *Traité Juridique de la Monnaie et du Change* (1925, surveying the French material); Frauenfelder, *Das Geld als Allgemeiner Rechtsbegriff* (Bern, 1938); Curiel Benfield, *El Dinero, Fenomino Economico-Juridico* (Mexico, 1940). Baudin, *La Monnaie et la Formation des Prix* (2d ed., 1947), a study in economics, is helpful also in legal analysis (especially sec. 3). Among the discussions of the nineteenth century the most distinguished is by Gustav Hartmann, professor at Basel: *Über den Rechtlichen*

sis turns out to be utterly problematical. This observation applies preeminently to the notion of money.[2]

The Nineteenth Century, happy and confident, had, on the whole, a rather unsophisticated solution. In the leading commercial countries—habitation of the foremost thinkers on money—gold and silver coins were then circulating freely. Thus it seemed natural to define money as a quantity of precious metal. This "metallistic" concept was strongly supported by the phrasing of basic monetary laws. As early as 1803 the French law identified the franc with 5 grams of silver, 9/10 fine.[3] Such identification of money and metal appears also in numerous later enactments.[4] In the United States, according to the so-called Gold Standard Act of 1900, the dollar "consists of 25 8/10 grains of gold, 9/10 fine," [5] and President Roosevelt's Proclamation of Janu-

Begriff des Geldes und den Inhalt der Geldschulden (1868). The inquiry into the legal theory of money by the great German commercialist L. Goldschmidt in his *Handbuch des Handelsrechts*, I (1868) 1060, though valuable, was less successful. Regarding medieval and other early literature see *infra*, p. 118 n. 14.

Jurists of English or American legal education have published little on the subject. (Dr. Mann, *supra*, has a German background.) An exception is Eder, "Legal theories on money," 20 Corn.L.Q. 52 (1934), and to some extent Oliphant, "The theory of money in the law of commercial instruments," 29 Yale L.J. 606 (1920). S. Dana Thornton (U. S. Delegate to various international monetary conferences), *The Position of Law in the Doctrine of Money* (1882), while emphasizing the importance of legal thought in monetary matters, is not in point.

The present writer's *Das Geld in Theorie und Praxis des Deutschen und Ausländischen Rechts* (1925), will be referred to occasionally for some less important German materials not included in this volume.

2. F. C. von Savigny in his famous *Obligationenrecht* of 1851 (I 406), pointed to the "almost mysterious quality by which money differs from other things." Similarly, a modern English writer speaks of its "mystic quality." See Graham, Am. Econ. Rev., Papers and Proceedings of the Am. Econ. Ass'n, 1947, 304. Concerning the "mystic" conception of money, also Ad. Wagner, *Theoretische Sozialökonomik* II, 1 (1909) 149.

3. Law of 17 *Germinal* Year XI (March 28, 1803), Duvergier, *Collection des Lois* XIV 176. For the text of the revolutionary and postrevolutionary laws see also André Mater, *Traité Juridique de la Monnaie and du Change* (1925) 408, 413.

4. Thus the German "mark" was legally defined to be "the tenth part of a gold coin," a pound of pure gold yielding 139-½ pieces of such coins. Laws of Dec. 4, 1871, § 2, R.B.G1.1871, 404, and of July 9, 1873 (*Münzgesetz*) Art. I, *ibid.*, 1873, 233.

5. 31 Stat. 45, 31 U.S.C. 314; *infra*, 431.

ary 31, 1934,[6] which is still in force, "fixes the weight of the gold dollar to be 15 5/21 grains, 9/10 fine," a formula noteworthy all the more because minting of gold had been discontinued in 1933 and was definitely prohibited by the Gold Reserve Act of January 30, 1934.[7]

The metallistic concept of money has never been exact. One corollary was that bank notes, though actually a common medium of exchange, were legally denied the dignity of being "money." Consequently, a debtor when paying with bank notes would actually deliver things not owed under the contract; in a legal sense his performance was not a "payment" proper but a substitute transaction. This was an over-artificial theory, suggesting a weakness of the basic assumption, particularly where bank notes were made legal tender by legislative enactment, which means that they had to be accepted by creditors.[8] Paper money issued by the government itself was ordinarily declared legal tender at the outset. In such a situation it was even more difficult to withhold the recognition as "money." There were civilized countries such as Italy, which during long periods of the Nineteenth Century had practically a paper currency.[9] Should it be asserted that they had no money at all?

Even leaving aside paper currency and inquiring into the components of a metallic currency, one finds that the so-called "token" or "subsidiary" currency did not live up to the metallistic doctrine. For instance, the silver content of the American ten-cent piece, the "dime", was in 1853 reduced to the equivalent of 9.3 cents,[10] a value further lessened through the decline of the silver market since 1873. Yet invariably and without disturbance did the dime circulate at 10 cents. Devotees of the metallistic doctrine would consistently deny the recognition as "money" to such subsidiary coins, though the latter everywhere constituted the bulk of circulating media.[11] Metallism simply did not see the real problem of how and why certain things became "money".

Of course, there is a connection between money and metal, or more specifically between money and gold (or silver). First of

6. Proclamation No. 2072, 41 Stat. 1730, 31 U.S.C. 821.

7. *Infra*, p. 65; sec 43II.

8. *Infra*, p. 47.

9. See, e. g., Laughlin, *Money, Credit and Prices*, II (1931) 626; Supino, *La Carta Moneta in Italia* (1921).

10. 44 Stat. 160.

11. See, *e. g.*, L. Goldschmidt, *supra* n. 1, at 1124. However, Goldschmidt, at 1167, decides for the "nominal" value in the event the standard coin was changed after the time of contracting. This amounts to an admission that the metallistic theory is impracticable.

all it may be good policy to have in circulation exclusively or preponderantly coins of a metal content equal in value to the monetary denomination of the coin ("full-bodied" coins). Belief of writers in the soundness of this policy was the main reason for the use of "metallistic" phraseology especially in the nineteenth century. It is only human to deny the name of "money" to what, according to those writers, never ought to be money; that honorable name should be preserved for "hard" money. With this question of policy, important though it is, we are not concerned. However, also from a legal point of view, money is linked to metal in a certain way. Where under the law coins are to be in circulation, one is confronted with a legislative order to the mint authorities to manufacture and issue metal pieces as prescribed. In case the national money is definitely tied to a specific metal—the "standard" metal —there is still another and more important rule of administrative law. That tie is wrought by the law which directs all the government agencies concerned to act in such a way that the prescribed ratio between the value of the monetary unit and the price of the standard metal is maintained in the market. This applies especially to purchases and sales of the standard metal by the government and by agencies under its control. The paramount importance of this rule is brought home by the present American legislation which still tells us, as mentioned before, that the weight of the gold dollar is fixed to be 15 5/21 grains of gold, 9/10 fine. No gold dollar being coined, or intended to be coined, at the time of the legislative pronouncement, it is impossible to take the law literally. Yet it makes sense. American authorities are bound to see to it that the value of the dollar equal to 15 5/21 grains of gold, 9/10 fine will be maintained in the market. Events may be stronger than the government and force a change in the market price, but not even in this case does the rule become meaningless. As long as the law is not amended it will be the duty of the government to work toward a restoration of the statutory ratio. This is what happened after the Civil War.

Recent developments have shown that even the tenuous legal tie to metal as described may be dropped as in the case of the Soviet currency.

In conclusion it may be said that the metallistic conception of money, inasmuch as it identifies money with a quantity of metal is too crude to be scientifically helpful. Actually that theory has now practically been abandoned everywhere.[12] Economists even stretch the notion of money far beyond coins and paper currency.

12. Historically noteworthy is a speech made in the House of Commons on May 24, 1819 by Sir Robert Peel advocating the resump-

II. The State Theory of Money

If money is not a quantity of precious metal—what else is it? Frequently the answer is offered that those things are money which the state declares to be money. Again, the answer is too facile. Juridically, it has been mostly based on the fact that it is the state that makes money "legal tender". Still there is overwhelming evidence that money has circulated in numerous, perhaps in all, countries, without being legal tender.[13] Stronger support for the State Theory may be found in the fact that modern law confers upon the government a monopoly of minting and of the issuance of paper money. Yet experience shows that in emergency situations media of exchange not issued by the government enter circulation [14] and have then inescapably to be rec-

tion of cash payment. "The House must now make up its mind upon the question whether the old metallic standard should be restored or not and after an experience of 22 years, it was in his [Sir Robert Peel's] mind impossible that any considerate man should hesitate upon that question, or upon the expediency of returning to the ancient system of fixing upon some standard of value. Upon the necessity of establishing such a standard he could appeal to the opinion of all writers upon political economy, and to the practice of every civilized country as well as to that of our own antecedent to the year 1797. All the witnesses, indeed, examined before the committee, strongly recommended the establishment of this standard, one witness alone excepted (Mr. Smith, a very respectable man), who was an advocate for the indefinite suspension of cash payments. But when this witness was asked whether the indefinite suspension of cash payments was to exist without any standard of value, he answered 'No—the pound should be standard.' He was required to define what he meant by the pound. His answer was 'I find it difficult to explain it, but every gentleman in England knows it.' The committee repeated the question, and Mr. Smith answered, 'It is something that has existed without variation in this country for eight hundred years—three hundred years before the introduction of gold.' This was indeed the only definition he could give." 40 Hansard, *Parliamentary Debates* 679 (1819). Today almost everybody will admit that (leaving aside the suspension of cash payments), the "respectable Mr. Smith" was right, see Feavearyear, *The Pound Sterling* (1931) 1. Views similar to those of Peel had been advanced by Horner, Chairman of the Bullion Committee, 19 *Hansard* 806 (1811). See, however, Berkeley, *Works* III, (Fraser's ed., 1871), "The Querist, 1735–1737," where Berkeley questions, *inter alia*, "Whether the true idea of money, as such, be not altogether that of a ticket or counter?" (Query 23.) *Cf.* also questions 24, 25, 35, 47, 441, 475. Says Walker, *Money* (1891) 292: "Prior to the recoinage of 1774 when the current coin was so debased that a guinea might contain an amount of gold of 10, 20, or even 30 per cent below the mint standard . . . the question 'What is a pound?' became a practical and serious one."

13. *Infra*, p. 54.

14. Impressive evidence has been gathered by Falkner, "The private

ognized in courts as money, be it only in order to protect payments made *bona fide* with such media during the emergency period.[15] A strong case in point is that of the paper money issued by the Confederacy during the Civil War. Though the courts of the United States considered the Confederates as "rebels" having no authority to issue money, transactions made in Confederate notes within the territory of the Confederacy were held valid as the notes had actually circulated as money.[16] The same theory helped the courts to cope successfully with other instances of "illegal" currency.[17] In countries with weak governments or back-

issue of token coins" in 16 Pol.Sci. Qu. 303 (1901). He refers to private money issued in England before 1816 (p. 309), in France in 1871 and 1872 (p. 312), and in the United States during the suspension of specie payments in 1812 and 1837 (p. 316) as well as during the Civil War (p. 324), for which period more than 5,000 varieties have been described. See furthermore on "tradesmen's tokens," Feavearyear, *The Pound Sterling* (1931) 157, 192, 296; on clearing house certificates and other private paper money issued in the United States, particularly during the crises of 1893 and 1907, *infra*, sec. 43 I. On "ice notes" issued by the ice companies, 19 Op.Att.Gen. 98 (1888).

Much material on French emergency money is found in Sigogne, *La Théorie Juridique de la Petite Monnaie* (1942) 37 and *passim*. The bronze and aluminum *jetons* (checks or marks) issued by the French Chambers of Commerce during the inter-war inflation were issued with governmental authorization; they were protected against forgery by the law of April 29, 1921, *D.P.* 1923 IV, 221, Art. 29. See Cass, June 25, 1927, *D.H.* 1927, 435, and, generally, Corvol, *L'Émission des Bons de Monnaie par les Chambres de Commerce* (thesis, Paris, 1930) and Sigogne 18. In Germany issuance of emergency money *(Notgeld)* without consent of the government was made unlawful, though not prevented by the law of July 17, 1922, *R.G.Bl.* 1922 I 693. Especially, during the French occupation of the Ruhr in 1923, issuance of unauthorized emergency money was inevitable within the occupied area. Its validity, particularly as to payments, was never in doubt. In the absence of a societary theory of money, peculiar justifications were advanced. See Fricke, *Zeitschrift für das Gesamte Handelsrecht* LXXXVII (1924) 399, at 438; *Mitteilungen der Handelskammer Berlin* (1924) 328. On the amount of unauthorized *Notgeld* see Dawes, *A Journal of Reparations* (1939) 472.

15. In the judgment of June 14, 1937, *J. W.* 1937, 2381, the *Reichsgericht* conceded that emergency money issued without authority by municipalities during the inflation was real money "nothing being left to the Reich Government but to tolerate the emission of money substitutes."

16. *Thorington* v. *Smith*, 8 Wall. (75 U.S.) 1, 19 L.Ed. 361 (1869). See *infra*, sec. 42 III.

17. In the celebrated lawsuit of the *Emperor of Austria* v. *Day and Kossuth*, 3 De.G.F. & J. 217 at 234, 45 Eng.Rep. 861 (1861), the defendant alleged that the note issue of the National Bank of Austria was unlawful, the Hungarian Parliament not having assented to it. The court passed over this point by holding that the notes were *de*

ward economic conditions, foreign money may become a major element of local currency without the will of the local government. A signal Eighteenth century example is that of the American colonies which at times had practically no domestic (English) coins in circulation.[18] The monetary rôle played in the Far East by the Mexican trade dollar may also be mentioned in this connection.[19] A reminiscence of the era in which part of the monetary circulation was not government controlled is found in the Italian Commercial Code of 1865 as amended in 1882 where reference was made to money that had *"corso legale or commerciale"* within the realm.[20]

Countries with a properly functioning monetary system, too, will sometimes be confronted with the same phenomenon, first indirectly,—inasmuch as their courts or other authorities may have to deal with monetary conditions of less fortunate countries[21]—but also directly. For instance, in the United States private gold coins circulated freely from 1830 until 1864, especially in California subsequent to the "gold rush",[22] and in England bank notes of an entirely private character were recognized as money in 1758 by Lord Mansfield in the case *Miller v. Race.*[23] Generally speaking, new financial needs and habits may bring about circulating media in respect to which the application of the rules on money would be reasonable and logical.

facto legal tender because of their common circulation. Another type of illegal currency (notes actually circulating, although issued by a bank chartered illegally and for fraudulent purposes) was considered in *Orchard* v. *Hughes*, 1 Wall. (68 U.S.) 73, 17 L.Ed. 560 (1863), and *Rogers* v. *Leftwich*, 49 Tenn. 480 (1871). Again using the societary theory of money, the courts upheld the validity of payments made in such notes.

18. *Infra*, sec. 40 III.

19. *Infra*, sec. 21 III.

20. Under the hypothesis of a "commercial circulation" the debtor, save for an agreement to the contrary, was allowed to pay foreign money debts in Italian currency (Commercial Code Art. 39). The rule was given broad interpretation by Ascarelli, "I debiti di moneta estera e Art. 39 Cod. di Comm.," *R.D. Comm.* 1923 I 444; *id.*, *La Moneta* (1928) 67, n. 1. Scaduto, *I Debiti Pecuniari e il Deprezzamento Monetario* (1924) 40, related it to customary circulation of foreign money within border sections. The Civil Code of 1942 § 1278 has expunged the reference to the "corso commerciale."

21. American cases dealing with Far East monetary conditions may serve as an instance. *Gordon* v. *Magone*, 40 F. 747, 750 (S.D.N.Y. 1889); *Grunwald* v. *Freeze*, 4 Cal. Unrep.Cases 182, 34 P. 73 (1893); *Dyer* v. *United States*, 2 *Customs Decisions* 462 (1939).

22. *Infra*, section 42IV.

23. 1 Burr. 452, 97 Eng.Rep. 398, *infra*, p. 74, n. 10.

While thus money has emerged and may emerge again without official authorization, the government, on the other hand, might be unable to force its issues upon the people. The *mandats territoriaux*—successors of the assignats of the Great Revolution—are a famous example.[24] At the time of their emission they were already circulated at only 17 or 18 per cent of their face value and soon they went under entirely. Also in cases of belligerent occupation it is invariably a problem to the occupant to what extent he will succeed in making his monetary issues actually circulate.[25]

In conclusion we may say that in the phenomenon of money the attitude of society, as distinguished from state, is paramount. It should be added, as a matter of legal theory, that the societary process which gives life to money is not exactly a process of "customary law". It does not engender new canons of law. Similarly, as in the emergence of new types of negotiable instruments[26] the process only widens the range of things to which a pre-existing body of rules—in this case of rules of monetary law—may be applied.

By no means does the societary theory of money deny the fact that normally the modern state exercises full power over the currency. But legal theory has to take care also (and in a sense primarily) of abnormal and controversial situations. This test the State Theory of money cannot stand.[27]

In German thought the State Theory is deeply ingrained. It dominates German cases[28] as well as literature[29] with the note-

24. Stourm, *Les Finances de l'Ancien Régime et de la Révolution* II (1885) 326; Marion, *Histoire Financière de la France* III (1915) 470. More about the *mandats territoriaux*, *infra*, p. 50, n. 29.

25. *Infra*, sec. 34 III.

26. See Bigelow, *Bills, Notes and Checks* (3d ed., 1928), sec. 29; Norton, *Bills and Notes* (4th ed., 1914) 1–7. "Fungibility" (infra p. 12) also depends on business customs. Customary law making circulating media legal tender would entail their recognition as "money," *Reichsgericht*, Nov. 28, 1923, *R.G.Z.* 107, 78 (concerning German coins and notes circulating in the German colonies). Such customary law will hardly be found within the framework of a modern state, and its existence was denied in the case cited. Since the court did not use the societary theory the puzzling conclusion was reached that German money, actually the only common medium of exchange in the colonies, was not "money" there.

27. In special situations a legislative provision may exclusively contemplate state-made money, *infra*, n. 33.

28. See *Reichsgericht*, Sept. 25, 1919, *R.G.Z.* 96, 262 ("Money is measure of value and medium of payment only by virtue of the command of the state"); July 11, 1924, 58 *Entscheidungen des Reichsgerichts in*

29. See note 29 on next page.

worthy exception of Savigny.[30] The representative work of that school of thought is Knapp's "State Theory of Money".[31] Knapp, however, is inconsistent since he admits that social groups within the state *(Zahlungsgemeinschaften)* may well create money of their own. Occasionally the State Theory appears also in writings [32] and cases [33] of the Anglo-American orbit, but there the societary approach is entirely predominant, especially with the courts.[34] It enjoys also some legislative support through the Criminal Code of the United States which makes punishable the counterfeiting of bank notes "intended by the law or *usage* of a foreign country to circulate as money." [35] [Italics added.] In France the general inclination is toward the State Theory [36] but

Strafsachen LXXXVIII, 255, 256 ("Money includes every medium of payment the value of which is certified by the government or its authorized agent and which is designated for public circulation regardless of its being a legal tender."); App. Hamburg, June 22, 1921, *Hanseatische Rechts- undGerichtszeitschrift* (1922) 86.

29. See Wolff, *supra*, n. 1, at 573, ns. 1 and 575.

30. *Obligationenrecht* I (1851) 406, 408. The Austrian, Menger, an economist interested and versed in the law of money, likewise advocated the societary theory in *Handwörterbuch der Staatswissenschaften* (3d ed., 1904, by Conrad), "Geld," at 574.

31. *Staatliche Theorie des Geldes* (1905, abridged and tr. by Lucas and Bonar, *State Theory of Money*, 1924).

32. Hawtrey, *The Gold Standard in Theory and Practice* (4th ed., 1939) 3, 32; Mann, *supra*, n. 1, at 12. Surprisingly enough, the "State Theory" has been adopted by the Code of Commercial Law drafted by the Amer. Law Institute and the National Conference of Commissioners on Uniform State Laws (1948) Art. III, § 106, where money is defined as "a medium of exchange authorized or adopted by a domestic or foreign government as part of its currency" rather than in terms of medium of exchange current in any country.

33. *Stephens* v. *Commonwealth*, 188 Ky. 824, 224 S.W. 364 (1920) ["circulating medium by the authority of the United States"] and criminal cases cited *infra* n. 76. The State theory of money is also implicit in *Adelaide Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, *infra*, p. 132.

34. The numerous cases characterizing "money" without qualification as the circulating medium of exchange, *infra*, n. 43, all proceed on the basis of a societary doctrine. The same is true of *Miller* v. *Race*, *supra*, p. 7, n. 23. In *Moss* v. *Hancock*, [1899] 2 Q.B. 111, the Court quotes approvingly a societary definition of money by the American, F. A. Walker, *infra*. *Emperor of Austria* v. *Day and Kossuth*, *supra*, n. 17 is likewise in point. Among writers, reference may be made to Oliphant, *supra*, n. 1, at 615; to F. A. Walker, *Money* (2d ed., 1891) 2; to book reviews by Dawson, 49 Yale L.J. 162, 163 (1939); H. S. Ellis, *Social Research* 1942, 538 and Eder 17 N. C.L.Rev. 470 (1939).

35. 18 U.S.C. 482.

36. App. Paris, Feb. 8, 1856 *D.P.* 1856 II 184 [notes of the Bank of

the situation is uncertain.[37]

Historically, the societary theory can be traced back to medieval thought which required the consent of the people for valid alterations of money.[38] This view was enunciated in a decision by Pope Innocent IV (1243–54)[39] and can be considered the prevailing doctrine of the writers up to the Sixteenth Century.[40] Generally, medieval thought was far from conceding omnipotence in monetary matters to the ruler. Thus Bartolus taught that money issued by the ruler was to be deemed counterfeit (*moneta falsa et adulterima*) if it was lacking in weight and approved metal content.[41]

England not money because not emitted by English Government]. See also *Pandectes Françaises* (1903), "Monnaies et Médailles," secs. 29 and 30.

37. An able refutation of the State Theory of money in Baudin, *supra* n. 1, at 349. Gény, "Quelques Observations sur le rôle et les pouvoirs de l'Etat en matière de monnaie et de papier monnaie" *Mélanges Hauriou* (1929), 389; Gréciano, *Du Rôle de l'Etat en Matière Monétaire* (1896); and Dandine, *Le Rôle de l'Etat en Matière Monétaire* (thesis, Paris, 1939) are not very helpful.

38. *Infra*, p. 33. On the other hand, there seems to be an ancient vestige of the State Theory. Aristotle, in a famous passage of his *Ethics* (V, 5) derives νόμισμα (money) from νόμος which means law as well as general convention or custom. Aristotle turns against the theory that things are money by nature, instead of νόμος. Still the interpretation of Aristotle's monetary doctrine is controversial. See Taeuber, *Geld und Kredit im Mittelalter* (1933) 305; Gonnard, *Histoire des Doctrines Monétaires*, II (1935) 29, 34. See, furthermore, *infra*, p. 34, on the medieval idea of the sovereign's ownership in coinage.

39. Bridrey, *Nicole Oresme. La Théorie de la Monnaie au XIV ième Siècle* (1906) 327, gives the full text of the "apparatus" of the Pope which contains the statement.

40. Gonnard, *supra*, n. 38, at 118; Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* II (1883) 189; Ascarelli, *La Moneta* (1928) 12, 22. The warnings addressed by the early writers to the rulers were originally conceived as commands of "natural" law; in the era of absolutism they were transmuted into considerations of monetary morality and policy. See, *e. g.*, Pufendorf, *De Jure Naturae et Gentium* (1672, tr. in *Classics of International Law*) V, 1, secs. 15 and 16.

Taeuber, *Molinaeus' Geldschuldlehre* (1928) p. 27, n. 81, and p. 29, describes the method used in the sixteenth century (and probably before) to evade monetary regulations unresponsive to the common valuation of coins. The governments attempted to take measures against the disobedience of the public, *e. g.*, prohibiting the payment of a premium over the legal rate for gold coins; these prohibitions were disregarded; they were not renewed and this gradually resulted in a tolerance of the customary ratio.

41. Bridrey, *supra*, n. 39, at 344.

III. Money as a Medium of Exchange

In order to define the concept of money more clearly we have to examine the functions of money. Three of them are generally recognized as fundamental: (1) it is the common medium of exchange; (2) it is the common denominator of value; (3) it is the standard of deferred payments.[42] There is a marked uniformity of judicial opinion [43] strongly supported by notable writers [44] to the effect that the function of being the common medium of exchange is a basic one, and permits a basic characterization of money. Indeed if goods and services are universally available in return for a definite medium of exchange the value of all goods and services will be measurable in terms of that medium, (Function 2, supra), and that fact in turn will make of such medium an appropriate standard of deferred payments, (Function 3, supra), provided to be sure, that there is enough confidence in the steadiness of existing valuation. Further uses of money, sometimes enumerated by writers are in logical analysis still more clearly derivable from the principal medium-of-exchange function.[45] This applies particularly to the potency of money to serve

42. See Laughlin, *Money, Credit and Prices* II (1932) 22; Alfred Marshall, *Money, Credit and Commerce* (1923) 12; Jevons, *Money and the Mechanism of Exchange* (1875; 1921 ed.) 13; Helfferich, *Money* (1927) 302; Encyc. Soc. Sciences, "Money"; and others.

43. See *United States* v. *Arjona*, 120 U.S. 479, 486, 7 S.Ct. 628, 30 L.Ed. 728 (1887) ["(money) . . . the circulating medium of exchange"]; *Woodruff* v. *Mississippi*, 162 U.S. 291, 300, 16 S.Ct. 820, 40 L.Ed. 973 (1895) ["Doubtless the word 'money' is often used as applicable to other media of exchange than coin"]; *Ling Su Fan* v. *United States*, 218 U.S. 302, 310, 31 S.Ct. 21, 54 L.Ed. 1049 (1910) ["quality (of coin) as a legal tender and as a medium of exchange"]; *United States* v. *Williams*, 282 F. 324, 325 (D. Wash., 1922) ["Money is the standard of value, as well as the medium of exchange"]; *Richard* v. *American Union Bank*, 253 N.Y. 166, at 175, 170 N.E. 532 (1930) [contrasting "medium of exchange" and "commodity"]; *Vick* v. *Howard*, 136 Va. 101, at 108, 116 S.E. 465 (1923) ["the word 'money' . . . includes any lawful circulating medium of exchange"]; *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 F.2d 166, 172 (C.C.A. 8th, 1938) ["coins and currency actually circulating as a medium of exchange"]; *People* v. *Alba*, 46 Cal. App.2d 859, 117 P.2d 63, 66, 67 (1941) ["circulating medium"]; and numerous other cases cited in *Words and Phrases*, Perm. Ed., "Money". See also *Reichsgericht*, Nov. 24, 1902, *J. W.* 1903, S2 [*allgemeines Umsatzmittel*].

44. *E. g.*, Alfred Marshall, *supra*, at 12, Jevons, *supra*, at 13; Kemmerer, *Money* (1935) 10; Cassel, *The Theory of Social Economy* (1932) 375; Steiner and Shapiro, *Money and Banking* (1941) 11; Menger, *Grundsätze der Volkswirtschaftslehre* (reprinted ed., 1924) 250.

45. The relative *economic* potency of the various functions of money is outside the scope of the present discussion, as is the question

as a "store of value" and as a "general medium of payment". Surprisingly the latter function has quite often been represented as the essential criterion of money. That, however, is evidently a vicious circle.[46] "Payment" presupposes a "debt" and "debt" presupposes the knowledge of what money is, "debt" being the monetary obligation.

Sometimes and especially by early writers, money is treated as a kind of order for goods.[47] (Adam Smith's "a bill for a certain quantity of necessaries or conveniences").[48] Definitions of this kind suggest something like an obligation on the part of the holders of goods to surrender them for money. This is, of course, legally untenable but is objectionable also from an economic point of view. Money, as a common medium of exchange, ordinarily opens access to goods, yet the assumption of any further and more forceful relationship of the individual money holder to the available stock of goods lacks foundation. The valid kernel of the order-for-goods theory is the medium-of-exchange function.

The next step in analysis is to be an inquiry into the properties which make certain things a common "medium of exchange". The criteria must be such as to suit coins as well as paper money.

Both of course are tangibles. More specifically they belong to the group of "fungible" things, "of which"—in the language of the Uniform Sales Act—"any unit is from its nature or by mercantile usage treated as the equivalent of any other unit." [49] This

whether, in primitive society, as assumed by Laughlin (*supra*, n. 42) the standard-of-value function has preceded the medium-of-exchange function. It is hard to believe that cattle, shells and the like could have been chosen as standards of value without any background of actual bartering of those goods. Accord: Menger, *supra*, n. 30, at 555. The issue is speculative.

46. It is surprising that distinguished economists such as Hawtrey, *Currency and Credit* (1919) 15, and Robertson, *Money* (rev. ed., 1929) 3, should have fallen into this error. The same is true of *Reichsgericht*, July 11, 1924, *Entscheidungen des Reichsgerichts in Strafsachen* LVIII 255, 256. The distinguished German jurist, Gustav Hartmann, *Über den Rechtlichen Begriff des Geldes*, etc.—*supra*, n. 1—committed a similar mistake when, under the influence of Roman law, he defined money as the ultimate medium of discharging obligations. According to Roman law, judgments had invariably to be given in monetary terms.

47. *E. g.*, by Bastiat, *Essays in Political Economy* (Wells tr. 1877) 199. A survey is given by Baudin, *supra* n. 1, at 359.

48. *Wealth of Nations* II ch. 2 (Modern Library ed., p. 275).

49. Uniform Sales Act, § 76. The same definition is employed in the Warehouse Receipt Act, § 58. In both Acts, due to their special purpose, reference is made only to goods. The Restatement, *Restitution* (1937), § 66(e) somewhat sum-

classification of money is old; it had in substance been recognized in ancient Roman Law.[50] But how does money differ from other "fungibles"? Obviously money differs from all other fungible things such as wheat, coal and Model T Fords, in that its composition is legally irrelevant. Money may be a gold piece, a silver piece, a copper piece, a paper bill or whatnot. *Only the relationship of the money piece to a certain ideal unit* (dollar, pound sterling, franc, mark, etc.), has relevancy inasmuch as the thing is treated as money and not as a mere piece of metal or a scrap of paper. Money, the concrete object, thus is a thing which, irrespective of its composition, is by common usage[51] given and received as a fraction, integer or multiple of an ideal unit.[52]

It is this unit which we have to investigate further.

IV. The Ideal Unit

Originally "talent", "as", "pound", "mark" and other monetary terms were names of weights. But when people, while continuing to use the name of the weight, acquired the habit of giving and receiving the coined metal piece not by weight but in reliance on the stamp, an independent value came into being detached from the actual value of the weight of the coin. Coinage, by saving the trouble of weighing, adds to the value of the metal piece; that value may be impaired on the other hand by seigniorage, by wear, by defects and abuse resulting from an imperfect coinage technique. Thus the value of the monetary unit becomes

marily defines as fungible "chattels or choses in action which are identical in kind or quality with other chattels, or choses in action."

50. *"Res quae pondere numero mensura constant,"* Gai *Institutiones* III 90; D. 12.1.2. § 1. Fungibility as a basic concept of civil law systems is derived from this source. The German Civil Code, § 91, comes very close to the Roman definition. ["Fungible things, in the legal sense, are movable things which in ordinary dealings are customarily determined by number, measure or weight"]. The French Civil Code employs the concept of fungible things in Art. 1291; the Spanish Civil Code in Arts. 337, 1740; the Argentine Civil Code in Arts. 820, 2241. The Roman-German definition has been justly criticized. Weight is a sort of "measure" and the number sometimes is combined with measures, sometimes with pieces (100 cigars, one Model T Ford). See Wolff in *Ehrenbergs Handbuch des Handelsrechts* IV, 1 (1917) 10. The American definition seems preferable. A case where money is expressly treated as a "fungible" thing is Trib. Rennes, Oct. 18, 1917, *Droit Financier* 1918, 44. See also *infra*, p. 154.

51. "Common" rather than "mercantile" usage because this usage, of course, is not confined to commercial situations.

52. Accord: Supreme Court of the Republic of Colombia, Feb. 25, 1937, *Gaceta Judicial*, XLIV 613, 618, quoting the author's volume, *Das Geld* (1925).

more or less disconnected from its physical substratum. Nevertheless, in the conciousness of the social community, its significance is sufficiently distinctive. To take a modern example, between March 6, 1933, when the United States went off the gold standard, and January 31, 1934, when a new gold parity of the dollar was fixed by the President, there was still at any given moment a neat idea of what a "dollar" meant. The existence of a monetary unit is apparently a phenomenon of social psychology [53] which can be traced historically for each unit, yet is impossible to decompose analytically into simpler logical elements. The American dollar can be traced back, through many vicissitudes, to the Spanish "milled dollar" or peso, the value of which was adopted by Congress in 1792 as the basis of the American monetary system. Again, the Spanish peso may eventually be traced back to a weight unit. There exists an uninterrupted chain of value notions concomitant with the use of the peso-dollar terms. But the dollar concept existing at any given time is as little susceptible of definition as, say, the concept of "blue".

No more can be said than that "dollar" is the name for a value which, at any definite moment, is understood in the same sense throughout the community, and since goods and services are evaluated in terms of the dollar, that unit is a measure or a standard of value. Quite appropriately, therefore, the dollar is characterized in American legislation as "the standard unit of value".

The social operation and usefulness of the ideal unit is apparent. In dealing with coin or paper money people will look only at the arithmetical and easily ascertainable relationship between the individual money-thing and the unit. This means a tremendous simplification in dealings with money. At the same time, the abstract character of the unit yields perfect multiplicability as well as divisibility. On the reverse side we have the fact that the use of the same unit, say of the dollar, at different times may reveal a split between the so-called "legal constancy" of value [54] (a

53. A philosophical analysis of this consciousness has been attempted by Folbert Wilken, "Zur Phänomenologie des Geldwertbewusstseins," *Archiv für Socialwissenschaft und Socialpolitik* LVI (1926) 417. Unfortunately, Wilken's discussion is not very lucid. The psychological approach is gaining ground in monetary economics. Baudin, *supra*, n. 1, at 362, 354. It is indispensable in legal inquiry.

54. The legal-constancy-of-value formula, which is easily misleading was first used it seems by Knies, *Das Geld*, 2nd ed., (1885) 285. It was endorsed by later German writers. Similarly, Arnauné, *La Monnaie, le Crédit et le Change* (5th ed., 1913) 194, quoted with approval by

dollar always a dollar) and its variable purchasing power, a split generative of "money illusion" and of crucial legal problems. But this is a price which must be paid for the operation of an eminently effective social instrument. Its indispensability was evidenced by the Bolshevik Revolution which for a few years tried to manage without money but was compelled to abandon the experiment.[55]

Thus it appears that the seemingly abstract definition arrived at suggests relations of a high social usefulness. Though conceived in juridical terms, it is valid in the economic field also because it defines the *primary* characteristics of money which obtain everywhere. German literature for the most part distinguishes between "money in the legal sense" and "money in the economic sense",[56] but there is only "one world" monetarily. The advocates of monetary dualism have not pushed logical analysis far enough. At the end of that analysis, singleness of basic notion is bound to emerge.

The ideal unit, core of the money concept, is known under various names.[57] Often it is called "monetary unit",[58] a term anticipating of course the meaning of money; it is nevertheless convenient in most cases. "Unit of account", likewise frequently

the Swiss Federal Tribunal, Feb. 11, 1931, *Amtliche Sammlung* 57 II 69, J.D.Int. 1931, 510, 515. *Contra:* Landesberger, *Währungssystem und Relation* (1891)—a forgotten but valuable study—p. 157. Irving Fisher, *The Money Illusion* (1928) actually deals with the illusion of constancy of value.

55. Katzenellenbaum, *Russian Currency and Banking* (tr. from Russian, 1925) 94, 98.

56. The distinction was first developed by Hartmann, *supra*, n. 1. It was followed not only by German, but also by Italian writers. See Scaduto, *I Debiti Pecuniari* (1924). However, it is true that for the purpose of economic inquiry a strict definition of money is not always required, and that according to the objective of the particular inquiry, an *ad hoc* definition may be chosen. Cannan, *Money* (8th ed., 1935) 2, decides to refrain from any definition whatsoever. In the law, such a method is inacceptable. In a particular sense the Mixed Appellate Court of Alexandria contrasted the "economic" and the "juridical" notions of money, the former merely comprising metal money. *Iacchia & Co.* v. *Land Bank of Egypt*, judgment of Dec. 29, 1927, J.D. Int. 1928, 769.

57. *Bates* v. *United States*, 108 F.2d 407 (C.C.A.7th, 1939), speaks of the "ideal" or "abstract" unit. The *Reichsgericht*, Oct. 21, 1933, *R.G.Z.* 142, 23, 31, quoting the author, adopted the term "ideal unit."

58. The term is used in the Brussels Convention for the Unification of Certain Rules Relating to Ocean Bills of Lading of 1924, Art. 9, Hudson, *International Legislation* II (1931) 1358, and in *In re Crowell*, 84 F.2d 206 (C.C.P.A., 1936).

employed,[59] is not desirable as there are other units of account [60] for which the term ought to be reserved. The same is true of "unit of value" [61] which is even more vague. Anglo-American writers generally prefer the phrase "money of account"; [62] but if any clarity is to be attained in the analysis of our subject matter there must be a specific term for the tangible thing usually called "money". The expression "money" therefore should be retained for physical money,—that is, for coins and paper money. Employing the name "money" for the ideal unit obliterates an essential distinction. The unit is but one element in the concept of money.[63] Hence the phrase "money of account"

59. For instance, in *Pyrmont, Ltd.* v. *Schott*, [1939] A.C. 145, 157 (Pr.C.) and *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat*, [1943] A.C. 507 (Pr.C.). Cf. also *In re Chesterman's Trusts*, [1923] 2 Ch. 466, 477 (C.A.), where the coin representing the ideal unit is called "unit of account," certainly not a commendable terminology. Says Lord Russell of Killowen in *Adelaide Elec. Supply Co., Ltd.* v. *Prudential Assur. Co., Ltd.*, [1934] A. C. 122, 148 (H. of L., 1933): "The question [is] whether there existed something (which is variously called a measure of value, a standard unit of value, money of account, and a unit of account) which would be called an Australian pound as distinct from an English pound. . . ."

The equivalent term *Rechnungseinheit* is widely employed, particularly in Germany, by writers (Helfferich, Liefmann) and in legislation (*Münzgesetz* of August 30, 1924, *R. G.Bl.* 1924 II 254, § 1 ["*Im Deutschen Reich gilt die Goldwährung. Ihre Rechnungseinheit bildet die Reichsmark*"]).

60. Especially units of the type of the Argentinian "gold peso," *infra*, p. 130. In times of monetary troubles, contracts are frequently couched in terms of the value of a definite metal unit rather than in terms of the local monetary unit. Thus in Germany during and after the great inflation debts were described in terms of "gold marks" although no gold was circulating or available. See *infra*, sec. 15IV.

61. See the quotation from Lord Russell of Killowen in n. 59, *supra*. The same expression is chosen by such writers as Knapp, *The State Theory of Money* (1924) and Wagemann, *Allgemeine Geldlehre* (1923) ("*Wertcinheit*"). *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 F. 2d 166, 172 (C.C.A.8th, 1938), confuses the concepts of "unit of value" and "money", relying on the somewhat loose but substantially correct language of *United States* v. *Van Auken*, 96 U.S. 366, 24 L.Ed. 852 (1878).

62. It appears in the basic monetary law of the United States of April 2, 1792, 1 Stat. 250, Art. 20. See also *Staadtler* v. *United States*, 25 C.C. P.A. 136 (1937) and Lord Russell of Killowen, *supra*, n. 59.

63. An elaborate analysis of the money-of-account concept has been advanced by Keynes, *A Treatise on Money* (1930) 3. Keynes takes "money-of-account" to be the money "in which debts and prices and general purchasing power are expressed"; it comes into existence, says Keynes, along with debts and price lists. The counter-concept is called by Keynes "money itself"; by delivery of it "debt contracts and price contracts are discharged."

ought definitely to be avoided in a discussion aspiring to scientific accuracy.

V. The Nominalistic Doctrine

A money conception which dissociates itself from the metallic element is ordinarily called "nominalistic".[64] The term stems from scholastic philosophy where it was antithetical to "realism". In its monetary application it is a bit oblique, inasmuch as reference to the "name" *(nomen)* of money does not convey the idea—"numeralism" would perhaps be more exact—, but "nominalism" sufficiently indicates the formal quality of the approach as contrasted with the "metallistic" one.

Not infrequently the nominalistic conception is expressed by the phrase that money is a "token" or a "symbol".[65] Such terminology is not precise. A silver dollar or a one-dollar silver certificate is not a token or symbol of a dollar; it is the thing

This is no real contrast. That "money of account" is nothing but the money referred to in contracts and price lists; it is "the money itself" to be paid in the future. There are not two types of money, but two ways of using it. A regular bank deposit would involve "money of account"; yet, being used in discharge of contracts, *i. e.*, as a medium of payment, it would, at the same time, be "money itself." Keynes' definition is evidently unsatisfactory. Coulborne, *An Introduction to Money* (1938) 30, states that money has a "double aspect, namely, as a unit of account" and as "legal tender." It is in itself neither the one nor the other.

64. In *Das Geld* (1925) 9, the writer has contrasted "nominalism" with "valorism." The latter term has been adopted by a number of writers to embrace metallism and the bill-on-wealth theory of money, *supra*, p. 12.

65. "Symbol" language is conspicuously used by Karl Marx, *Das Capital* (Everyman's Library ed.) I, 105.

Reference is sometimes made (*e.g.*, by Monroe, *The Monetary Theory before Adam Smith* [1923] 5) to Plato, *Republic*, Book II, sec. 12, where the philosopher, in discussing the economic structure of the community, points to the necessity of purchase and sale, from which a market, and money as a *τῆς ἀλλαγῆς* will originate. Monroe infers that in the opinion of Plato, "it is a matter of comparative indifference what material is used for money." However, the words probably only signify that money is a customary object of exchange. In ancient Greek the term has a more concrete meaning than it has today. Simmel (see next note) does not refer to Plato though the Monroe interpretation would fit excellently into his system.

How the term "symbol" induces loose legal language is shown by *Victor & Achelis v. Salt's Textile Mfg. Co.*, 26 F.2d 249, 255 (Conn., 1928), where the court calls francs "a symbol of value" only to stress the point that they are not securities. The (Military) Monetary Reform Law for Germany ("Issue Law") of 1948 strangely employs the term "symbol" for money pieces, metal or paper, 13 Fed.Reg. 4970 (1948).

(money) itself. Inasmuch as the words "token" or "symbol" suggest anything beyond what is indicated by nominalism, they are confusing. This is especially true of "symbol" with its aura of mysticism. As a matter of fact, the German philosopher Simmel concluded from the allegedly symbolical character of money that money does not need a value of its own.[66] In reality, pernicious inflations such as occurred in Germany subsequent to the World Wars I and II and in Russia subsequent to World War I have shown that money ceases to function entirely when its value is lost. Usability for exchange is the motor of circulation, and the ending of circulation is the ending of money.[67]

Nominalism has often been linked to the State Theory of money. As a matter of fact where monetary circulation is conceived as resulting from the state's fiat, nominalism must necessarily ensue. But it is erroneous to believe that the societary approach as such leads to metallism.[68] The contrary is true because the conception of the ideal unit, product of a process of social psychology, is actually disconnected from the notion of metal value. The societary theory of money and nominalism go well together.

In the pre-monetary era, as is well known, cattle, cowry shells, beads, etc., were employed as circulating media.[69] Repeatedly courts have tied these primitive media of exchange to modern money in order to illustrate the latter's societary significance.[70] In fact the primitive media and modern money are more intimately cognate than appears at first glance. It has long been pointed out that the former implied a nominalistic element (the abstract "sheep", the abstract "shell").[71] Later times have fur-

66. *Philosophie des Geldes* (5th ed., 1930). The work, a most spirited and brilliant analysis of money, would deserve the attention of Anglo-American students. A summary which unfortunately does not bring out the point made in the text is found in Spykman, *The Social Theory of Georg Simmel* (1923) 219ff.

67. American courts have held that "money" connotes value. *People* v. *Miller*, 278 Ill. 490, 116 N.E. 131, 139 (1917), and other cases cited in *Words and Phrases*, Perm. Ed., "Money".

68. Or to "valorism," *supra*, n. 64.

69. The leading work on this subject is A. R. Burns, *Money and Monetary Policy in Early Times* (1927). See also Laughlin, *supra*, n. 9, at I, 3 (not abreast of contemporaneous literature).

Regarding colonial "commodity-money," *infra*, sec. 40 II.

70. *M'Eowen* v. *Rose*, 5 N.J.L. 687 (1819); *Crutchfield* v. *Robins*, 24 Tenn. 15, 17 (1844); *Boric* v. *Trott*, 5 Phila. (Pa.) 366 (1864); *Burford* v. *Memphis Bulletin Co.*, 56 Tenn. 691, 694 (1872); *Hamilton* v. *State*, 60 Ind. 193 (1877); *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 F.2d 166 (C.C.A.8th, 1938).

71. Turgot, in his *Réflexions sur la Formation et la Distribution des*

ther developed the nominalistic feature and finally made it dominant.[72] The practical consequences will appear especially in the chapter on debts.

VI. Variants of the Meaning of Money: Related Terms

The meaning of "money" varies within certain limits. The word "money" is perhaps more important and more often used in legal relations than any other. It appears everywhere—in constitutions, codes, statutes, judgments, administrative regulations, contracts, wills and other legal documents. It is implicit in numerous crucial legal concepts such as "sum", "debt", "payment", "capital stock", "finance", "sale" (as distinguished from barter), etc. Even such a fundamental concept as "value" presupposes gauging in terms of money.

According to circumstances a more extensive or a narrower interpretation is required.[73] In its broadest sense "money" may mean any wealth convertible into, or valued in terms of money.[74]

Richesses (1770), sec. 36, offers this example: "In a country where there is only one kind of sheep, one can readily take the value . . . of a sheep as the common measure of values, and it will be said that a barrel of wine . . . is worth a certain number . . . of sheep. In truth, there is some difference between sheep, but . . . people will take as unity the common value of a sheep of average age and of average quality. In this way, the indication of values in terms of sheep becomes something of a conventional language, and this word *sheep*, in the habits of trade, will signify a certain value which, in the meaning of those who understand it, carries the idea not solely of *a sheep*, but of a definite quantity of each of the most common commodities, which are regarded as equivalent to this value; and ultimately this expression will so thoroughly mean an imaginary and abstract value rather than a real sheep, that if by chance a sudden decimation of sheep occurs, and if in order to obtain one of them it is now necessary to give double the quantity of wheat or of wine that we gave previously, people will say that one sheep is worth two sheep. . . ." See also Burns, *supra*, n. 69, at 11 and Cassel, *The Theory of Social Economy* (1932) 371.

72. The earliest formulation of the nominalist doctrine is Julius Paulus' famous discourse in D. 46.1.42, where he explains that the official and permanent value of money, through its quantitative equality, remedies the difficulties of exchange, and that, with its official impression, it draws its usefullness and legal effect from quantity rather than from substance. See Gonnard, *supra*, n. 38, at I 53.

73. The multiplicity of the meanings of "money" and its linguistic equivalents is a universal phenomenon. See, *e. g.*, the writer's *Das Geld* (1925) 2; Ascarelli, *La Moneta* (1928) 45.

74. As early as Thomas Aquinas *pecunia* was *totum quod homines in terra habent.* Van Roey, "La monnaie d'après St. Thomas d'Aquin," *Revue Néo-Scholastique* XII (1905), 27, 44.

Or it may include at least securities or bank deposits. Conversely, the word "money" may be meant to exclude paper money or foreign money. Often the problem of definition is one of major importance. Men's lives sometimes depended on that interpretation because in past centuries crimes affecting "money" were punished with death.[75] Generally because of the harsh consequences of such crimes, courts in criminal cases have been inclined to employ a narrow, and sometimes artificially narrow, interpretation.[76] Here and there the task of courts and lawyers has been eased by statutory definitions of money.[77]

Wills referring to "money," require special consideration. The importance of this subject appears from the fact that there are hundreds of American [78] and several dozen English [79] cases in point. The explanation is that English and American testators employ the term in a vague popular sense. To this fact the courts had to adjust themselves. Ascertaining and giving effect to the real intent of a testator, however unskilled and inaccurate his language be, has always been the supreme rule of common law and civil law alike. Hence the variety of usage with regard to the word "money" is fully reflected by the cases on wills. There are some which impart to the term the meaning of wealth of any kind.[80] Others, without going so far include securities,[81]

75. See *Harrison's Case*, 1 Leach 180, 168 Eng.Rep. 192 (1777); *Rex* v. *Wilcox* (1808), n. 15 to Bayley, *Bills* (1st Amer. ed., 1826) 6; *Rex* v. *Hill*, Russ. & Ry. 190, 168 Eng. Rep. 754 (1811). On English penal legislation, *infra*, p. 41.

76. *United States* v. *Wells*, 28 Fed. Cas. 520, 521 (1812); *Lewis* v. *State*, 28 Tex.App. 140, 12 S.W. 736 (1889); *Price* v. *State*, 204 Ind. 316, 184 N.E. 181 (1933); *Rex* v. *Wilcox*, (1808), *supra*, n. 75. But see *State* v. *Neilon*, 43 Ore. 168, 73 P. 321 (1903).

77. An instance is *White* v. *City of Lincoln*, 79 Neb. 153, 112 N.W. 369, 370 (1907). Cf. also *infra*, p. 110, n. 28.

78. See Schouler, *On Wills* (6th ed., 1923; Supp.1926), sec. 1132; *Words and Phrases*, Perm. Ed., "Money" and "Moneys"; "Bequest of 'money' in Wills," 173 A.L.R. 656 (1948), supplementing 93 A.L.R. 514 (1934).

79. See "Money (term in English law)," 92 *Law Journal* 171 (1942) and Morris, "The meaning of money," 55 L.Q.Rev. 540 (1939).

80. *"Monnaie," "Geld,"* etc., are used equally in that broad sense, but not so much in French or German wills and other legal documents. In fact, the above problem of interpretation has little significance in civil law. There, pecuniary grants in wills are quite preponderantly made in definite sums. This discrepancy between common law and civil law practice deserves further investigation.

81. For instance, *Hinckley* v. *Primm*, 41 Ill.App. 579 (1892); *In re Torrance's Estate*, 15 Misc. 317, 37 N. Y.S. 583, 585 (1895); *Baldwin* v. *Baldwin*, 107 N.J.Eq. 91, 151 A. 741 (1930); *Rogers* v. *Thomas*, 2 Keen 8, 48 Eng.Rep. 531 (1837); *Charlton* v. *Carter*, 75 *Rapports Judi-*

furniture,[82] real property.[83] There is virtual unanimity that in addition to coins and paper money, bank deposits are ordinarily encompassed whenever a testator speaks of money.[84] English law possesses an old interpretative rule according to which money in a will should be construed to mean only coins, bank notes and bank deposits unless it is very clear from the text of the will itself that a broader meaning and especially a complete disposition of the testator's personal property was intended.[85] Such a presumption is unknown in this country. American courts make their interpretation on the facts of each particular will, with little regard for the technical meaning of money.

Some terms, often used synonymously with "money", should be distinguished in scientific discussion. "Currency" in American legislation refers to paper money,[86] but is generally understood to designate the whole of the circulating media of a given country.[87] "Cash" (the French *numéraire,* the German words *bares Geld)* is primarily an accounting term and includes in addition to paper money, coin and bank deposits.[88] "Specie" ordi-

ciaires de Quebec (*Cour Supérieure,* 1937) 34 [bonds and stock].

82. For instance, *Cadogan* v. *Palagi,* 25 Ch.D. 154 (1883); *McCullen* v. *Daughtry,* 190 N.C. 215, 129 S.E. 611 (1925). Contra: *Beit* v. *Beit,* 98 Conn. 279, 119 A. 144 (1922).

83. *In re Miller's Estate,* 48 Cal. 165 (1874); *Talbot* v. *Anderson,* 292 Pa. 454, 141 A. 256 (1928).

84. *Infra,* sec. 8 II.

85. The basic English rule, criticized by Morris, and by 92 *Law Journal* 171, *supra,* n. 79, was laid down by *Lowe* v. *Thomas,* Kay, 369, 5 DeG. M. & G. 315, 43 Eng.Rep. 891 [1854]. More recent examples are *Re Buller,* 74 L.T. 406 [1896]; *Re Gates,* 73 Sol.J. 429 [1929]; *Morgan* v. *Morgan* [1942] Ch. 345 (C.A.).

86. See U.S.C., title 31, ch. 8, "Coins, Coinage and Currency." Canadian terminology is the same, British North American Act, 1867, § 94, n. 14. In colonial and post-colonial legal language "currency" means colonial money as contrasted with sterling money. See, *e. g., Terrell* v. *Ladd,* 2 Wash. (Va.) 150 (1795); *Scott* v. *Hornsby,* 1 Call (Va.) 41 (1797); *Proudfit* v. *Murray,* 1 Call (Va.) 394 (1798).

87. "Currency means money, coined money and paper money equally." *Klauber* v. *Biggerstaff,* 47 Wis. 551, 3 N.W. 357 (1879); similarly, Webster, *International Dictionary* (2d ed., 1947), "Currency"; Hunt, *A Treatise on the Law of Tender* (1903) 95. See also "International Convention for the Suppression of Counterfeiting Currency, 1929," League of Nations, *Treaty Series* CXII 372, Art. 2 ("In the present Convention, the word *currency* is understood to mean paper money [including bank notes] and metallic money the circulation of which is legally authorized"). In the Agreement of the International Monetary Fund (*infra,* sec. 37) "currency" has a particular meaning. Agreement, Art. XIX(d).

88. Kester, *Principles of Accounting* (4th ed., 1939) 12; see also *McGovern* v. *U. S.,* 272 F. 262, 263 (C.C.A.7th, 1921) and *Bingham* v. *Montcalm County,* 251 Mich. 651,

narily means coin as contrasted with paper money.[89]

The Latin languages possess dual terminology: *Monnaie—argent; moneta—danaro; moneda—dinero.* In technical usage, the terms "monnaie", "moneta", "dinero" are preferred, similarly as in English the adjective "monetary" has preference over "pecuniary".

Section 2

MONEY AND COMMODITY

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I. The Commodity Theory of Money

Money, it has often been said,[1] is a commodity. This is a half-truth, right or wrong, according to the approach taken. Fundamentally, "money" is antithetical to "commodities"; money and commodities are the two poles of the economic process. The basic diversity is illustrated by the old and universal distinction between sale and barter.[2]

Still, to some extent, money and commodities do follow the same line. This is true especially in the field of economics. Both are subject to the economic "law of supply and demand". Stating this relatedness is another way of saying that the fiat of the lawgiver is not the essence of money and cannot ultimately determine its value. Historically the commodity doctrine played an important role in eighteenth-century France as a revolutionary answer, in terms of "law of nature ", to the disgraceful monetary excesses of the absolute monarchy which had culminated in John Law's adventure.[3] With the outbreak of the Revolution the

232 N.W. 348 (1930). *Words and Phrases*, Perm. Ed., "Cash".

89. *Hartley's Lessee* v. *M'Anulty*, 4 Yeates (Pa.) 95 (1804); *Henry* v. *Bank of Salina*, 5 Hill (N.Y.) 523, 536 (1843). In colonial times, "specie" sometimes meant any specified kind of merchantable goods. 2 *Province and Court Records of Maine* (1931) xl, *infra*, sec 40 II.

1. For instance, by Mill, *Principles of Political Economy* (Laughlin ed., 1885), ch. 15, at 404.

2. The famous controversy of ancient Roman law whether barter be a sale (*pro:* Sabinus; *contra:* Proculus, and their followers) has been illuminated by Taeuber, *Geld und Kredit im Mittelalter* (1933) 316. Sabinus seems merely to have been extending certain sales rules to barter, and only under special conditions, rather than denying the obvious disparity of the two types of transactions.

3. Among the writers in question

commodity doctrine became part of official economic philosophy, only to prove, before long, embarrassing to the government. When in December, 1789, the assignats were made legal tender, gold and silver coins attained a growing premium.[4] Under the spell of the commodity doctrine—in fact, repeatedly invoking it—the government felt constrained to let the money-changers have their way and their profits as "dealers in commodities". The mob rioted against this policy out of a notion which was perhaps sounder than the theory of the government. The latter finally yielded. Decrees of April 8 and 11, 1793, suppressed the purchase and sale of coins as well as the making of contract clauses which would obligate debtors to pay in specie. Though the decrees, in reality, amounted to an abandonment of the commodity doctrine, the latter received a kind of honorable mention. They were declared to be applicable only to transactions entered into after the promulgation of a decree of May 17/20, 1791, *"qui déclare l'argent merchandise."*[5] Adepts of the commodity doctrine were apt to find a confirmation of their faith in that phrase.

The impact of this development upon French thought was deep and lasting. The commodity doctrine dominates French monetary theory to such an extent as to give it its distinctive color. As late as 1925 an elaborate attempt was made by a French jurist[6] to discuss the whole law of money in terms of the commodity doctrine, an enterprise destined to fail as the distinction between money and commodity is the very core of monetary legal analysis. Occasionally the commodity theory makes its appearance also outside of France.[7]

were Daguesseau, Quesnay and Turgot. Gonnard, *Histoire des Doctrines Monétaires*, II (1936) passim; Mater, *Traité Juridique de la Monnaie et du Change* (1925) 29.

4. On this and the following see S. E. Harris, *The Assignats* (1940); Stourm, *Les Finances de l'Ancien Régime et de la Révolution* II (1885), 326; Marion, *Histoire Financière de la France* III (1915), 470; Mater, *supra*, n. 3, at 30.

5. See Mater, 36.

6. Mater, *supra*, n. 3. *Contra:* Ascarelli, *La Moneta* (1928) 61. *Republic Acceptance Corporation* v. *Bennett*, 220 Mich. 249, 189 N.W. 901, 904 (1922), makes it clear that money, as a medium of exchange, "is not an article of commerce."

7. In *Gray* v. *Warden*, 29 Upper Canada Queens Bench Rep. 535 (1870), the Court, citing McCulloch's *Principles of Political Economy*, held that Canadian legal tender bills were not money, "have no intrinsic value as coin has. They represent only, and are the signs of value. Money itself is a commodity . . . it is the thing signified". A promissory note payable in Canadian bills was therefore declared invalid since promissory notes have to be phrased in terms of money. Though the result may be sound for other reasons, *infra*, p. 150, n. 52, the court's argument does not make

Though that theory must be rejected as a general proposition one has to admit that in special situations pieces of money are dealt with as commodities. This happens mainly in the market of foreign exchanges. Ever since there has been a theory of money, it has been recognized that money may have a "second use",—namely, to be purchased or exchanged. In the language of Thomas Aquinas,[8] money, if sold or exchanged, is "measured, not a measure;" *"mensuratum,"* not *"mensura"*. Its intrinsic or exchange value as distinct from the extrinsic or nominal (face) value is controlling in the situation.[9] The latter value is a matter of the law; the former is the result of economic conditions. While the intrinsic value is subject to fluctuations, the extrinsic one is invariable. These considerations are relevant juridically, as appears primarily in dealings with foreign money.[10] But it also happens that domestic money is "sold", mostly for foreign money.[11] In such a case the obligation to deliver the money sold is not a "debt" because a debt is an obligation for the "payment" of money as such.[12]

much sense and has rightly received sardonic criticism. See Oliphant, "The theory of money in the law of commercial instruments," 29 Yale L.J. 609, 611 (1920). The decision illustrates the confusing effect of the commodity theory.

8. Cf. Van Roey, "La monnaie d'après St. Thomas Aquin," *Revue Néo-Scholastique* XII (1905), 27, 207. One may doubt, however, whether the second use of money was clearly seen by Thomas Aquinas. His point is merely that a coin, apart from its monetary use, is simply gold or silver. *De Regimine Principum*, ch. 14.

9. The terms "extrinsic" and "intrinsic" value have been preserved in modern phraseology. See, *e. g.*, 28 Stat. 4 (1893), 31 U.S.C. 311 ("It is hereby declared to be the policy of the United States . . . to coin both gold and silver into money of equal intrinsic and exchangeable value. . . .") and *Ling Su Fan* v. *U. S.*, 218 U.S. 302, 310, 31 S.Ct. 21, 54 L.Ed. 1049 (1910). According to *Bank of the State of North Carolina* v. *Ford*, 5 Ire. (27 N.C.) 692, 698 (1845), the notion of "intrinsic value" is confined to coins. It is their "true, inherent and essential value, not dependent upon accident, place, or person, but the same everywhere and to everyone." Cass., May 6, 1868, *Sirey Recueil* 1868 I 344, contrasts the "intrinsic" with the "nominal" value.

10. *Infra*, sec. 23.

11. Such transactions are referred to in the Agreement on the International Monetary Fund (*infra*, sec. 37), Art. V, § 7 and Art. VIII, § 4. Local money may also be purchased with local money. Thus, in special situations, gold coins were locally purchased with current money, despite the absence of a general gold premium.

12. A German party had bought German marks in Luxemburg with francs. After the collapse of the mark, the party was denied "revaluation"—*infra*, sec. 14—because this was not a monetary obligation. *Reichsgericht*, Jan. 3, 1925, *J.W.* 1925, 1986.

II. Borderline Problems—Near-Moneys

The diversity of the rules applicable to money on the one hand and to commodities on the other makes it imperative to define the borderline.

Coin-shaped metals, even if made by the government, are not necessarily coins. Doubts begin where the government issues "commemorative coins" couched in terms of money (e. g., 50¢) but manufactured in amounts so limited as not to cover the demand of collectors. Such coins have a rarity value which renders them unfit for circulation as media of exchange. Commemorative issues were probably nowhere so frequent as in the United States,[13] although they are found also elsewhere.[14] The number of the American enactments increased rapidly reaching a peak of seventeen in 1936; one of the coins even perpetuates the memory of P. T. Barnum.[15] The official theory is that such coins are invariably money and must therefore be authorized by Congress under Art. I, sec. 8 of the Constitution which gives only Congress the power "to coin money." The theory may be questioned where intention and actual chance of general circulation are absent. The law of money is out of place in this situation.[16] In 1939 Congress prohibited the further issuance of commemorative coins.[17]

The problem is more complex where, as a result of inflation, gold (and perhaps other legal tender) attains a premium so that it will no longer be used in ordinary transactions. As long as the coins are allowed to circulate at a premium, as happened during the Civil War and until 1793 during the French Revolution, the coins retain their monetary quality because many transactions will then be made on a coin basis. In other words, in this situation, one is confronted with the phenomenon of "dual cur-

13. See 31 U.S.C. 376–388*o*. The coins were issued to particular agencies at par on condition that the profits arising from the sale of the coins at a premium be used for the commemorative purposes. For a popular account see, Nicholson, "Money in the make," *Saturday Evening Post*, March 13, 1937, p. 19.

14. As to the English Jubilee five-pound coins of 1887, see *Moss* v. *Hancock*, [1899] 2 Q.B. 111 (Q.B.), and the analysis *infra*, p. 55.

15. See Nicholson, *supra*, n. 13. This particular coin was struck in 1936 to commemorate the 100th anniversary of the incorporation of Bridgeport, Connecticut, birthplace of P. T. Barnum. 31 U.S.C. 388f.

16. Some commemorative coins have been declared legal tender. 31 U. S.C. 461. But not even this fact made them necessarily money. *Infra*, p. 55.

17. Act of Aug. 5, 1939, 53 Stat. 1209, 31 U.S.C. 376a.

rency."[18] A different solution is required where the coins have definitely disappeared from regular transactions, particularly when the taking of a premium is prohibited. They are then no longer "money" though the statute books still call them legal tender.[19] Evidently in such circumstances there is no good reason for protecting the *bona fide* holder of a stolen piece as the law of money demands.[20]

"Securities" (*"effets", "titoli de credito", "Wertpapiere"*) are not money.[21] They are distinct from it in that they are primarily dealt with as representatives of *rights* incorporated in the paper—not merely as multiples, integers or fractions of the monetary unit.[22] Consequently the parties to the deal will consider the special incidents of the right, such as the solvency of the issuer, the time and place of payment, etc. Even a "certified check" is not money, although it may pass from hand to hand.[23]

18. *Infra*, p. 129. The "dual currency" aspect is important in an appraisal of the Legal Tender Cases, *infra*, p. 1. This has been overlooked by Mann, *supra*, p. 1, n. 1, at 19, n. 2.

19. This process of demonetization seems to have been recognized in *Ottoman Bank of Nicosia* v. *Chakarian*, [1938] A.C. 260 (Pr.C., 1937) at 267, 278, and particularly so with regard to Turkish gold coins, at 270. In *Morris* v. *Ritchie*, [1934] N.Z.L.Rep.Supp. 196, the purchaser of sovereigns at a premium for resale was punished under a New Zealand Act of 1919 and Regulations of 1932, as dealing in gold coins without a license, despite the legal tender feature of the sovereigns. Also, the *Reichsfinanzhof*, supreme tax court of Germany, held a sales tax applicable to sales of German gold and silver coins, notwithstanding the fact that "money" was exempt from the tax. Opinion of Jan. 31, 1922, *Gutachten und Entscheidungen des Reichsfinanzhofs* VIII 100. A different theory seems to have been followed by the U. S. Treasury, which, the writer was told, paid only the equivalent of the nominal amount for Sovereigns imported here and delivered to the authorities by foreigners (*infra*, sec. 31 II (1)) despite the much higher value of the coins, because the Sovereigns were still legal tender according to the English statute books.

20. Nevertheless, App. Dresden, Jan. 19, 1922, *Bank-Archiv* XXII (1923) 241, protected the *"bona fide"* buyer of stolen German gold coins, which, at the time of the theft, stood at a premium of more than 800 percent and had been definitely eliminated from circulation as money. All emphasis was laid by the court upon the legal tender feature of the coins. The unsound result illustrates the defectiveness of the underlying theory.

21. The distinction between "security" and "money" was early indicated: Lord Mansfield in *Miller* v. *Race*, 1 Burr. 452, 97 Eng.Rep. 398 (1758); *Southcot* v. *Watson*, 3 Atk. 226 at 232, 26 Eng.Rep. 932 (1745); *Bank of United States* v. *Bank of Georgia*, 10 Wheat. (23 U. S.) 333 (1825).

22. *Reichsgericht*, Dec. 10, 1924, *R. G.Z.* 109, 295 at 297.

23. *Dike* v. *Drexel*, 11 App.Div. 77,

Bank notes are money [24] provided they circulate throughout the community at their face value.

Two rules will be helpful in the determination of whether certain coins and notes are or are not money. Whenever the pieces at hand are generally at a discount or at a premium they are not money.[25] And under the societary theory of money there is no objection to things being considered as money only in parts of the country. Thus the gold discoveries in California led to keen manufacturing of gold coins, some of which became common media of exchange in California. But it was held that the coins were not money in Massachusetts because they were not current there.[26] In this connection the Court's statement is pertinent, that people in Massachusetts, owing to their unfamiliarity with the coins, were liable to mistake them for silver half-dollars, as the gold was very light in color.

Objects which, for one reason or another, do not fall under the general concept of money may nevertheless, in special situations, be treated as such either on the strength of a particular statu-

42 N.Y.Supp. 979 (1896), but see *infra*, n. 27; App. Koenigsberg, Dec. 22, 1930, *J.W.* 1931, 3148 [check certified by the *Reichsbank*]. Application of "money" law was further declined by App. Paris, Nov. 30, 1921, *D.P.* 1924 II 25 [*ordre de virement*, a payment order of the *Banque de France*], and Supreme Court of Austria, April 29, 1925, *Die Rechtsprechung* (1926) 75 [*vaglia cambiario*, an Italian type of promissory note drawn by one bank to another]. The case of App. Jena, May 23, 1924, *Archiv für Rechtspflege in Sachsen, Thüringen und Anhalt* 1924, 197, is different. During the great German inflation, there being a great scarcity of media of payment, a manufacturer paid wages by checks drawn in sets and in round figures. The court held that the manufacturer had violated the Emergency Money Act of July 17, 1922, *R.G.Bl.* 1922 I 693, forbidding unauthorized issuance of circulating media of payment.

24. *Infra*, sec. 6 I. See, however, next note.

25. See *Klauber* v. *Biggerstaff*, 47 Wis. 555, 561, 3 N.W. 357 (1879) ["Whatever is at a discount . . . does not properly represent dollars and cents, and is not money"]. The existence of a premium was mentioned in *Moss* v. *Hancock*, *infra*, p. 55, n. 60, and *United States* v. *Barnard*, 72 F. Supp. 531 (W.D.Tenn., 1947), where the "money" character of certain gold coins was denied by a somewhat varied line of reasoning. The case of "parallel currencies", *infra*, p. 129, is different.

26. *Chapman* v. *Cole*, 78 Mass. (12 Gray) 141 (1858). In border districts it is not uncommon that coins or notes of the neighbor state are freely circulated. Sometimes territorial diversity of circulating media is created by the government, *infra*, p. 50. The territorial multiformity of Chinese currency is a special, politically conditioned phenomenon inherited from the past.

tory direction[27] or of a judicial ruling.[28] As will be seen,[29] the same is true of bank deposits. One may speak in such cases of "near-monies".[30]

III. Money Value—Purchasing Power

The legal problems connected with the value of money pertain quite preponderantly to international relations and will therefore be treated in Book II of this volume.[31] In domestic legal relations the nominal value dominates—there money is only *mensura,* not *mensuratum.* However, the modern habit of gauging the domestic value of money in terms of purchasing power does not lack juridical significance. As is well known, the degree of purchasing power is expressed by index numbers or averages of commodity prices. Though the ideas of index numbers and purchasing power are about two centuries old, they remained long unknown to the public at large.[32] Within the last fifty or sixty years they have won general public attention, particularly since the task of preparation and publication of index numbers has been taken over by official agencies. The period of monetary troubles which set in with World War I has increased considerably scientific as well as popular interest in indices. Index numbers seemed to offer a means for restoring firmness and reliability to a reeling world. The notion of purchasing power of money entered the consciousness and common speech of the community. Unrealistic, if not fantastic programs, always emerging in monetary discussion, were bound to thrive on "index numbers". The idea was propagated that long-term contracts should generally be made on an index basis for which the impressive name "tabular standard" was proposed,[33] suggesting equal rank with such con-

27. *Smith* v. *Field,* 19 Idaho 558, 114 P. 668 (1911) [certified check].

28. *Poorman* v. *Woodward,* 62 U.S. 266, 21 How. 266, 16 L.Ed. 151 (1858) [certificate of deposit].

29. *Infra,* sec. 8 II.

30. On "sales tax tokens" and "tax anticipation notes," *infra,* sec. 6 V; on "prisoner camp money," *infra,* sec. 34 II; on clearinghouse certificates, *infra,* sec. 43 I.

31. *Infra,* secs. 23, 33 III.

32. For brief historical accounts of index numbers, *Encyclopedia of the Social Sciences,* "Index Numbers," and Warren and Pearson, *Gold and Prices* (1935) 23. Cf. also Carr, *The Use of Cost-of-Living Figures in Wage Adjustments,* U. S. Bureau of Labor Statistics, *Bulletin* No. 369, (1925).

33. This term had first been used by G. Poulett Scrope in 1833; see Jevons, *Money and the Mechanism of Exchange* (ed. of 1921) 322. It is loosely used in economic discussion, *e. g.,* by W. C. Fisher, "The Tabular Standard in Massachusetts' History", 27 Qu. Journ. of Econ. 416 (1913) and likewise by Kemmerer, *Money* (1935) 105, n. 1, for the 1742 Massachusetts legislation, *infra,*

cepts as "gold standard" and "double standard". However, unlike the "gold standard" the "tabular standard" does not characterize a monetary system but seeks only a scheme of contractual provisions.[34] The value of the scheme, too, has been overrated. So distinguished an economist as W. St. Jevons advanced the opinion that the "tabular standard" would contribute to the stability of social relations and render commercial crises less intense. Such high expectations are entirely unwarranted.[35] There is still less merit in Irving Fisher's scheme of a "compensated dollar".[36] His plan was to link the monetary unit directly with the development of index numbers, by using as the main vehicle of the proposed currency gold certificates convertible into gold bullion according to the quarterly variations of the index level. The plan became nugatory through the discontinuance of gold circulation, but was never workable. The ever recurring alterations of dollar equivalents would have upset commerce with other nations and have invited unsound dollar speculation. From the viewpoint of the present study, the interesting feature is an admission implicit in Fisher's plan. Since under the latter the gold certificates are to be the basic element of currency, gold coins are supposed to be kept substandard in order to preclude the rise of a premium or a melting down of the coins. They would therefore assume the nature of subsidiary coins. At the same time Fisher's "dollar" would not exactly reflect purchasing power, but would change quarterly according to index numbers.

sec. 14, n. 61. There was no "tabular standard" (1) because the Massachusetts rule did not contemplate contracts in general, but only one sort of legal tender ("old tenor" notes having continued to be the common measure of value, Fisher, *loc. cit.*, at 423, n. 2), (2) a fall in commodity prices was not to be taken into account under the Massachusetts laws, (3) there were no "tables" offering a strictly arithmetical yardstick, but only equitable consideration of increases in price. The Massachusetts "soldiers' depreciation notes" of 1780, *infra*, p. 30, n. 40, likewise described by W. C. Fisher, *loc. cit.*, are closer to a "tabular standard", though very limited in scope and certainly no evidence in favor of it.

34. *Supra*, n. 33. It has been advocated also by Dawson and Coultrap, "Contracting by reference to price indices" (1935) 33 Mich. L.R. 685; and by Nogaro in "*La clause 'payable en or'*", *Revue Trimestrielle du Droit Civil* 1925, 1, at 28, making reservations as to short-term contracts.

35. On the "defects of Tabular Standard" see Kemmerer, *Money* (1935) 106.

36. *Stabilizing the Dollar* (1920); *The Purchasing Power of Money* (1922). Still more extreme and even abstruse ideas on "index-currency" were advanced in Germany. They were ably analyzed by Preyer, "*Das Phantom der Indexwährung*" *Bank-Archiv* XXXI (1932) 317.

Hence Fisher's attempt to tie the value of the dollar closely to purchasing power only brings into relief the necessarily independent character of the monetary unit.

The first legislative instance of the use of index numbers is probably a German law-decree of May 13, 1924,[37] permitting courts to give judgments in terms of the official index. It was actually only used occasionally in the adjudication of maintenance claims.[38] In 1935 Belgian legislation, when devaluing the franc prescribed that in awarding damages the courts should regard the purchasing power rather than the gold parity of the franc.[39] Legislatures have sometimes resorted to index numbers in order to adapt wages and salaries of state officials to fluctuations of purchasing power.[40] This procedure, however, is a budgetary hazard since the government is unable to scale the revenues in the same way. Enactment of such laws may therefore offer an incentive to inflation.[41] The main field of the use of index numbers is contracts, but there the numbers encounter other difficulties.[42]

Courts were, it seems, long reluctant to employ the notion of purchasing power. Apparently they sometimes had difficulties in understanding it.[43] More recently purchasing power has been referred to in cases as irrelevant under the nominalistic doctrine

37. *R.G.Bl.* 1924 I 552, § 9.

38. See, *e. g.*, Court Berlin, Sept. 22, 1934, *J.W.* 1934, 3018.

39. Law of April 20, 1935, *infra*, p. 181, n. 48.

40. See Economy Act March 20, 1933, Title II, sec. 3a, 48 Stat. 8 at 13; French Law of Oct. 1, 1936, art. 15, *D.P.* 1936 IV 393. Numerous decrees of this kind were enacted in Germany during the inflation: decrees of August 30, Sept. 27, Oct. 23, Oct. 24, Nov. 22, 1923, *R.G.Bl.* 1923 I 845, 912, 990, 993, 1110; of May 13, 1924, *ibid.* 1924 I 552, § 9. An American instance of similar legislation during an inflationary period is the Massachusetts Act of 1780, c. 29, 5 *Acts and Resolves of the Province of Massachusetts Bay* 1133, creating "soldiers' depreciation notes". These promised the soldiers payments additional to their nominal amounts in case of a rise in prices of certain commodities. Fisher, *supra*, n. 33, at 416, 436.

41. This was the Austrian experience. Wahle, *Das Valorisationsproblem* (1924) 141 at n. 1. Regarding the play of index numbers in the Hungarian hyper-inflation after World War II see Nogaro, *La Monnaie et les Systèmes Monétaires* (2d ed., 1948) 158 *et seq.*

42. *Infra*, sec. 20 II.

43. In 1921, the Chief Justice of a State court, in a dissent, expressed the belief that juries have no power to consider alternatives in the purchasing power since the latter is regulated by Congress. *Halloran v. New England Telephone & Telegraph Co.*, 95 Vt. 273, 276, 115 A. 143 (1921).

of debts[44] and as relevant in the assessment of damages.[45] Changes of purchasing power are considered as a matter of judicial notice.[46] Judicial use of index numbers is rare.[47]

The clause of the Federal Constitution, Art. I, sec. 8, cl. 5, which authorizes Congress "to regulate the value of coin," bears, after

44. *Perry* v. *U. S.*, 294 U.S. 330, 357, 55 S.Ct. 432, 79 L.Ed. 912 (1934); *Bates* v. *U. S.*, 108 F.2d 407 (1939).

45. *Halloran* v. *New England Telephone & Telegraph Co.*, 95 Vt. 273, 115 A. 143 (1921); also cases in next note and *infra* sec. 12, n. 48.

46. *Noyes* v. *Des Moines Club*, 186 Iowa 378, 170 N.W. 461 (1919); *Hurst* v. *Chicago, B. & Q. R. Co.*, 280 Mo. 566, 572, 219 S.W. 566 (1920); *Calihan* v. *Yellow Cab Co.*, 125 Cal. 649, 13 P.2d 931 (1932) [with wrong prophecy of coming betterment]; *Butler* v. *Allen*, 73 Cal.App.2d 866, 167 P.2d 488 (1946); *Bryant* v. *Foot*, (1868) L.R. 3 Q.B. 497 [Exch.], regarding depreciation from 1189 to 1868.

47. Not even in the determination of public utility rates is the use of index numbers significant. In *Indianapolis Water Co.* v. *McCart*, 89 F.2d 522 (C.C.A. 7th, 1937), *aff'd* 302 U.S. 419, 58 S.Ct. 324, 82 L.Ed. 336 (1938), the Wholesale Commodities Price Index of the U. S. Department of Labor in addition to a private index referred to by the parties was used by the Court to award the water works a 25 per cent increase in the rate base as of Nov., 1935, over the rate base as of April 1, 1933. On the other hand, the use of index-numbers was discouraged by *West* v. *Chesapeake and Potomac Tel. Co.*, 295 U.S. 662, 669, 55 S.Ct. 894, 79 L.Ed. 1640 (1935). A State commission had started from original cost which it translated into an amount of equal purchasing power as of the time of the decree by means of price indices. For this purpose the commission had selected sixteen commodity price indices, had weighted them and derived from them a "fair value" index which was applied to the original cost. This very elaborate and careful proceeding was held unconstitutional by a divided court, partly because the reasons for weighting the indices had not been disclosed by the court. The dissenting opinion, in which Justices Brandeis and Cardozo concurred, was written by Justice Stone. See also, Graham, *Public Publicity Valuation* (1939) 21; Dorety, "The function of reproduction cost in public utility valuation and rate making", 37 Harv.L.R. 173 at 190-191 (1923). Courts may resort to official index numbers only if they are introduced in evidence, except perhaps for general price trends, *Ohio Bell Tel. Co.* v. *Public Utilities Comm.*, 301 U.S. 292, 57 S. Ct. 724, 81 L.Ed. 1093 (1937). A good instance is *Town of Mamaroneck* v. *New York Interurban Water Co.*, 126 Misc. 832, 212 N.Y.S. 639, 661 (1925) [public utility; rate-making]. Index numbers are employed more frequently in labor arbitration, *Infra*, sec. 20 II. Index numbers were utilized in *Armentrout* v. *Virginian Ry. Co.*, 72 F. Supp. 997 (W.Va., 1947), for a review of damages awarded by a jury. Resort to index numbers in the valuation of foreign exchange was suggested in *Eder* v. *Commissioner of Internal Revenue*, 138 F. 2d 27, 28 (1943), a tax case. German cases using index numbers are *Reichsgericht*, Feb. 8, 1924, *J.W.* 1924, 804, App. Cologne, Dec. 4, 1923, *Leipziger Zeitschrift* 1924, 133.

the model of colonial legislation upon the reciprocal relations of coins, domestic and foreign, circulating in the United States. Hence it is related to "extrinsic" values and has nothing to do with purchasing power.[48]

Section 3

GOVERNMENT PREROGATIVE

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I. Historical Development

In our day coinage is everywhere considered inherent, as an exclusive prerogative, in the supreme power of government. This prerogative or monopoly originated in antiquity.[1] It was practiced by the Persian king, Darius (521–485 B. C.), if not earlier, but for long periods private issues and issues by non-sovereign municipalities or commanders in the field continued. Private coining was common in ancient Russia, India and China. In the Roman Empire the full prerogative of the emperor for coinage was not established until Diocletian (284–305 A. D.) The idea of imperial supremacy in matters of coinage was revived after the creation of the Holy Roman Empire in 800, though with slight success. Especially in Germany and Italy the right of coinage disintegrated entirely and was exercised by hundreds of minor potentates and municipalities.[2] They derived their power not only from imperial grants and leases which were of the most varied types,[3] but, to a large extent from custom and even from usurpation.[4] In France and England, however, the development was definitely toward royal supremacy.

The coinage monopoly was to the princes a financial resource of the first magnitude. A duty exceeding expenses was levied

48. See *infra*, sec. 41 II.

1. For the following see A. R. Burns, *Money and Monetary Policy in Early Times* (1927), chap. iv, *passim*, especially pp. 84, 100, 102, 109.

2. More on this in Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2nd ed., 1926) 241, 253; von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte*, II (1891), 303; *ibid.*, III, part 2 (1901), 365; Giuseppe Salvioli, *Il Diritto Monetario Italiano dalla Caduta dell'Impero Romano ai Nostri Giorni* [reprint from *Enciclopedia Giuridica*, X (1889)], chap. vi to viii.

3. *Infra*, n. 6.

4. Usurpation did not give title but a legally protected "possession" of the right of coinage. Salvioli, 63.

for the coinage itself, a part of the metal being retained as "seigniorage." [5] Another method of exploitation was the leasing of coinage privileges.[6] Profit from illegitimate measures was much higher. The practice was general to debase the coins clandestinely or overtly by diminishing their contents of precious metal or their weight or both while maintaining their face value,[7] a procedure made more effective by "decrying" the older, better pieces. The latter were not only divested of their legal tender quality but their circulation was prohibited; often they had to be surrendered to the authorities in exchange for the debased coin. The rating of the coins in terms of abstract units afforded another opportunity for exploiting the people.[8] The sovereign would profit doubly from his malpractices since he was in most cases in debt, and debasement meant relief to debtors.

The value of the coinage prerogative was not confined to its financial yield. It carried tremendous prestige, especially since the minting ruler would inscribe his effigy and coat of arms on the coins. The less the actual power of a potentate, the more crucial was the prestige point to him, and the more would he insist upon defending his privilege.

Under these circumstances it is no wonder that the problems connected with the coinage prerogative were keenly discussed by the theologians and jurists of the Middle Ages and the next two centuries. Appearances to the contrary notwithstanding, the doctrine was well settled at least during the Middle Ages, that the supreme prerogative of coinage rested with the emperor whose power was thought of as the ultimate source of the mint

5. A charge merely for the expenses is called "brassage," a modern concept. Laughlin, *Money, Credit and Prices*, I (1932), 79.

6. Such leasing resulted in a division of coining power. This fact caused German writers to distinguish between *Münzhoheit* and *Münzregal*, which, in Blackstone's language, might be translated as *majora* and *minora regalia* of coinage (Blackstone, Commentaries I *241), the former constituting the inalienable control of the Sovereign over coinage, the latter being a profitable and transferable right of manufacturing coins according to rules laid down by the Sovereign. However, it seems impossible to draw a helpful line of demarcation. See A. Wagner, *Sozialökonomische Theorie des Geldes und Geldwesens* (1909) 541: Friedensburg, "Deutsche Münzgeschichte," in Meister's *Grundriss der Geschichtswissenschaft* (2d ed., 1912), I, part 4, p. 102. Royal grants of the coinage privilege were not unknown in England. Case of Mixt Moneys, 2 Howell, State Trials, 114 at 118; Davis, 18 at 20, 80 Eng.Rep. 508 at 509 (Pr.C., 1604); *infra*, n. 13. See also the provisos [near the end] of 17 Edw. IV, c. 1 (1477-78).

7. See, *e. g.*, Luschin von Ebengreuth, *supra*, n. 2, at 255, 257.

8. *Infra*, p. 38.

privileges of the various rulers within the empire.[9] Another feature of medieval doctrine—the reaction of ecclesiastic and secular writers against the obnoxious alteration of coins—was already mentioned.[10] On the other hand the princes found support in a strange theory which was connected with the old custom of using the picture or other mark of a person as evidence of ownership. Complaisant writers claimed the ownership of coins for the sovereign,[11] a notion apparently confirmed by the practice of "decrying" the coins. The astounding fact is that this idea, slightly modified, reappears with the great French jurist Pothier (1695–1772), defender of the *ancient régime,* when he stated:[12] "The coins belong to individuals only as signs of the value which the prince has decided they should represent; therefore, if it pleases a prince that other coins should henceforth be the representative signs of the value of things, individuals have no right to retain former coins."

In England, where the abuses of coinage were not so great as in France, coinage was also considered a prerogative of the Crown, not requiring Parliamentary assent. The prerogative included the right to "change . . . the form and the substance" of "his [the king's] money" and "to enhance or debase the value of it, notwithstanding that the form and substance continueth as it was before."[13] This right fell into desuetude toward the end of the seventeenth century. Money became a matter for legislation. In the American colonies, the English government exercised its prerogative by the suppression of independent colonial mintage.[14]

Theoretically, the sovereign's prerogative was well settled, since Bodin, founder of the modern doctrine of sovereignty, held that prerogative was one of the very criteria of sovereignty.[15] In fact, without it no state can be independent. There was no doubt of this in the nineteenth century. In the United States where the

9. Cf. Salvioli, *supra,* n. 2, at 63.

10. *Supra,* p. 10.

11. Bridrey, Nicolas Oresme, *La Théorie de la Monnaie au XIV ième Siècle* (1906) 169. Oresmus, the most important monetary writer of the Middle Ages, rejected the claim. *De Origine, Natura, Jure et Mutationibus Monetarum* (1355), chap. vii.

12. *Traité du Contrat de Prêt de Consomption,* sec. 37.

13. Case of Mixt Moneys, *supra,* n. 6, 2 Howell, State Trials, 114, 119. The weakness of the royal prerogative was already indicated by Sir Matthew Hale, [*d.* 1676], *Pleas of the Crown** 193. Further material in Breckinridge, *Legal Tender* (1903) 9.

14. *Infra,* sec. 40 III.

15. *Six Livres de la République* (1576) I, chap. 11 (p. 213).

Constitution had not paid much attention to the question, the problem of private coins made itself felt when, after the discovery of the California gold fields, private gold coins began to circulate freely in California and other states. This situation led in 1864 to an enactment that did away with private coinage.[16] The prohibition extends to any coin intended for circulation even though the private or non-state character is clear from the inscription.[17] The same rule obtains in other countries.[18]

In the eighteenth century and far into the nineteenth century bank notes could be put into circulation without government authority.[19] Private bank notes were recognized as money by Lord Mansfield in *Miller* v. *Race*.[20] Government monopoly over the whole field of money was first judicially proclaimed as universal law in the remarkable lawsuit of the Emperor of Austria against the famous Hungarian patriot, Louis Kossuth.[21] After the army of the Hungarian Parliament had been defeated by the troops of the Emperor, Kossuth, then by parliamentary resolution dictator of Hungary, fled to London. In order to finance the fight against the Emperor, Kossuth ordered a London firm to print Hungarian paper money signed "In the Name of the Nation: Kossuth, Louis." His view was that he still had a mandate from the Hungarian nation, the Emperor having been dethroned by the Hungarian Parliament. On the petition of the Emperor, the Court of Appeal in Chancery enjoined Kossuth and his printer from manufacturing the notes on the ground that the *jus cudendae monetae* belongs to the "supreme power in every State." Despite the narrow literary meaning of the Latin phrase, comprehensive monetary prerogative is meant. While to this extent the opinion of the court is perfectly in accord with modern legal development, it suffers from other and grave defects. Though the court admittedly had no jurisdiction over matters of foreign

16. 13 Stat. 120, 18 U.S.C. 281, *infra*, sec. 41 IV.

17. The Act of 1864 prohibits "unauthorized making of coins" if "intended for the use and purpose of current money, whether in the resemblance of coins of the United States, or of foreign countries, or of original design."

18. English Coinage Act, 1870, 33 & 34 Vict., c. 10, § 5; French decree of Sept. 3, 1792: "Manufacturing money is a privilege appertaining only to the Sovereign", Duvergier, *Collection des Lois*, IV, 477; German Penal Code 146.

19. *Bank of Augusta* v. *Earle*, 38 U. S. 519 (1839); Daniel, *A Treatise on the Law of Negotiable Instruments* (7th ed., 1933), sec. 1785. As late as 1838 New York adopted a "free banking" system for banks of issue, *infra*, sec. 41 V.

20. 1 Burr. 452, 97 Eng.Rep. 398 (1758); *infra*, p. 74.

21. *The Emperor of Austria* v. *Day and Kossuth*, 3 De G. F. & J. 217, at 234, 45 Eng.Rep. 861 (1861).

sovereignty, it assumed jurisdiction, characterizing the Emperor's right as "property". That view was not only inconsistent with the court's own description of the right as pertinent to the supreme power in every state—which means sovereignty—but it was unfounded in itself.[22] The Emperor's petition should have been dismissed because of lack of jurisdiction.[23]

The bank note monopoly is generally delegated to the central banks,[24] in this country to the Federal Reserve Banks but the legal situation cannot easily be understood from the statute books.[25] Similarly, as in the case of coinage, the monopoly may extend to pieces closely resembling the official issues.[26]

In federations the monetary prerogative invariably vests in the federation.[27] The Constitution of the United States is not ex-

22. The court mentions that the National Bank of Austria, by the Emperor's authority, did issue notes which formed the circulating medium of Hungary and that from this arrangement a profit accrued to the Emperor. The profit was not specified by the court; probably a share by the Hungarian State (represented by the Emperor) in the bank profits was meant by the court. But as far as the writer knows there is neither in English nor in Continental law any support for the theory that having a participation in the profits of a corporation is a legal ground for bringing a suit on behalf of the corporation. No shareholder would have a right of action in a situation like this, much less a creditor, public or private. See also W. H. Moore, *Act of State in English Law* (1906) 153.

23. Since Kossuth had clearly violated the right of asylum, the English Government could have expelled him. It was probably because of Kossuth's world-wide popularity that the English government preferred to commit the Emperor to a law court proceeding in conformity with Kossuth's pretense that the controversy was a legal one.

24. For instance, in England to the Bank of England, 3 & 4 Wm. IV, c. 98 (1833); 18 & 19 Geo. V, c. 13 (1928); in France to the *Banque de France*, laws of April 27 and May 2, 1948, *D.P.* 1848 IV 76 and 86; in Italy the *Banca d'Italia*, Royal Decrees of May 6, 1926, n. 812, *Raccolta Ufficiale* 1926 II 1701, and of Sept. 7, 1926, n. 1506, *ibid.*, 1926 III 3489; in imperial Germany to the *Reichsbank*, Banking Law of March 14, 1875, *R.G.Bl.* 1875, 177.

25. More on this subject, *infra*, sec. 6 *V*.

26. Thus a French law of July 11, 1885, *D.P.* 1885 IV 83, makes a crime the unlawful manufacturing, hawking, selling, and distributing of instruments which resemble bank notes, so as to make them receivable like veritable bank notes.

27. See the federal constitutions of Argentina (1853), Arts. 67(10), 108; Australia (1900), Arts. 51(12, 13), 115; Austria (1934), Art. 34(5); Brazil (1891), Arts. 34(7), 66(2); Canada (1867), § 91(14) (15); Germany (1871), Art. 4(3); (1919), Art. 6(5); Mexico (1917), Arts. 28, 73(18); Spain (1931), Art. 14(12); Switzerland (1874), Arts. 38, 39; Venezuela (1931), Arts. 15(12), 78(4); Western Germany, Basic Law (1949), Art. 73(4).

plicit on this point, but federal prerogative has been gradually attained in a long drawn historical process.[28] Litigation on the meaning of the term "money", at least where the term is used in a technical sense has been held to involve a "federal question" over which the federal courts may have jurisdiction.[29] In colonies the home government, while possibly providing special currencies for the various dependencies, for instance, by the establishment of colonial banks of issue,[30] ordinarily retains the monetary prerogative.[31] Similarly, when the Philippines were given autonomy in 1935 it was provided that legislative acts affecting currency and coinage should not become law until approved by the President of the United States.[32]

II. The Moneta Imaginaria

From the thirteenth to the eighteenth century a peculiar and important trait of monetary prerogative developed in the power of the local ruler to rate ("tariff") the circulating coins in terms of the official local unit, with binding effect upon the subjects.[33]

28. *Infra*, secs. 41 III, 42 I and II.

29. *Woodruff* v. *State of Mississippi*, 162 U.S. 291, 16 S.Ct. 820, 40 L.Ed. 973 (1895). The court's reasoning is not convincing, however.

30. As early as the ancient Roman Republic, there developed a special colonial currency, the *victoriatus*, Mommsen, *Geschichte des Römischen Münzwesens* (1860) 391.

31. See Neumeyer, *Internationales Verwaltungsrecht*, III, part 2 (III, 1930) 237; Jenkins, *British Rule and Jurisdiction Beyond the Seas* (1902) 29; R. Chalmers, *A History of Currency in the English Colonies* (1893), passim; Dareste, *Traité de Droit Colonial* II (1931) ch. XVI (by Nogaro). The monetary situation of the former German colonies gave rise to a number of German cases, see *Reichsgericht*, Dec. 8, 1930, *R.G.Z.* 131, 41; *July* 31, 1936, *ibid.*, 152, 58, and earlier cases discussed by Neumeyer, *supra*, and by Nussbaum, *Das Geld*, 47. In 1684 the English Government suppressed the operation of the Massachusetts mint as violative of the prerogative of the Crown, *infra*, sec. 40 III.

32. Ordinance appended to the 1935 Philippine Constitution, § 1(9); United States Act of March 24, 1934, 48 Stat. I 456, § 2(9). As late as 1945 a Philippine Act was disapproved on this basis, *infra*, sec. 34, n. 40.

33. Taeuber, *Geld und Kredit im Mittelalter* (1933) 249, from whom the French instances in the text are taken. Much pertinent material is presented by Alfred Nagl, "Die Goldrechnung und die handelsmässige Geldrechnung im Mittelalter," *Numismatische Zeitschrift* XXVI 41 (Vienna, 1894; also published as a book under the same title), a laborious study of the utterly confused monetary practices prevailing in medieval Italian commerce. L. Enaudi, "Teoria della moneta imaginarla da Carlomagno alla Rivoluzione Francesa," *Rivista di Storia Economica* (1936) 1, is more in the nature of a narrative than of an analysis. F. A. Walker, *Money* (1891) 290, discusses the

In Western Europe this phenomenon had its roots in the coinage rule established by Charlemagne in terms of 1 *libra* = 20 *solidi* = 240 *denarii*.[34] While coining on this basis, imperfect from the beginning, soon degenerated, its appellations together with the ratio 1:20:12 were kept alive as a common denominator of circulating coins. Thus, in France, the monetary unit until the Great Revolution was the *libra (livre)* divided like the English pound, into twenty *solidi* (*"sous"*, "shillings") or 240 *denarii* ("d", *"deniers"*, "pence"). The ruler would prescribe the value of each coin in terms of that scheme. To give an example, an important coin of the fifteenth and sixteenth centuries was the golden *"scutus solis" ("ecu au soleil")* which was raised, by decrees, in 1487, from 33s. to 36s. 3d., in 1518 to 40s., in 1533 to 45s. Other coins, all of them having individual names, such as *"royal"*, *"couronne"*, *"ange"*, etc., were dealt with in a similar way. A French nobleman in 1560, according to a writer of the time, paid a servant £19. 16s., his wages for several years, in at least eight kinds of coins, each with a name of its own.[35] The nobleman could not pay directly in *"libra"*, *"solidi"* or *"denarii"*, as these were not available as concrete coins. In this system the monetary value of a coin—*valor impositus* (or *impositius*)—was to be ascertained from the rating decree rather than from the inscription of the coin. Raising the extrinsic value, namely, in terms of the *libra* and its subdivisions, was a favorite practice of the rulers. It was akin to reducing the intrinsic ("metallic") value. Both devices operated toward the deterioration of the money value and to the advantage of the ruler in his dual capacity as mint lord and debtor.

As a result of intrinsic and extrinsic deterioration the *livre*, from the time of Charlemagne, fell in value more than 98 per cent.[36] In a lesser degree the coins of Italy and other countries followed the same course.[37] In England, "raising" of coins was

moneta imaginaria under the denomination of "ideal unit."

34. The *libra* in the Carolingian system was in the first place a weight unit of silver from which 240 *denarii* were to be coined. Estimates of the Carolingian *libra* center in the neighborhood of 400 gr. See Luschin von Ebengreuth, *supra*, n. 2, at 134, 160; von Inama Sternegg, *supra*, n. 2, at I (1879) 456 and II 410, n.

35. See Taeuber, at 255, n. 740.

36. The law of Germinal 17, Year XI (March 28, 1803), 14 Duvergier, *Collection des Lois* XIV 176 rated the franc, the former livre, at 5 grams silver. The loss in purchasing power was still greater than the loss in weight.

37. Sombart, *Moderner Kapitalismus*, I (1921) 415, gives tables of the depreciation of some early European currencies.

by no means unknown,[38] and the penny of sterling silver was debased between the tenth and the nineteenth centuries from 24.00 to 7.27 grains troy.[39] On the whole, however, the relationship of the monetary unit and the metal value was incomparably better maintained in England than on the continent.[40] Nevertheless changes in the metal value of money sometimes led to strange distortions in the application of old laws.[41]

The *livre,* in the sense described, was early labelled *moneta imaginaria.*[42] It is the predecessor of the modern ideal unit. While a modern monetary system is planned and constructed in terms of a rationally conceived unit, the *moneta imaginaria* is a historically given arithmetical scheme which is superimposed

38. See Breckinridge, *Legal Tender* (1903) 41 and the tables in Feavearyear, *The Pound Sterling* (1931) 348 *et seq.* On the raising of the noble under Edward IV from 8s. 4d. to 10s., see Y.B. 9. Edw. IV, 49 (Hil.T., pl. 6) (1470). New rating was locally accomplished through public crying of the royal proclamation. The case of *Bostock v. Crimes,* Selden Society, *Select Cases in the Court of Requests* 191 (1552) deals with a proclamation of 1551 which lowered the "testoon" from 12d. to 9d. and the "groat" from 4d. to 3d. (Raising, if excessive, was sometimes followed by lowering.) While the proclamation was being read for the first time in one part of the city, a debtor in another part hastened to his creditor and tendered him his debt in testoons and groats at the old value. The creditor objected and finally ejected the debtor. At that moment, according to the testimony of a witness, the proclamation procession passed the house. The result of the ensuing litigation is not known.

39. Feavearyear, *op. cit.,* 350.

40. See Taeuber, *Geld und Kredit im Mittelalter* (1933) 256.

41. At least as early as the 13th century (Pollock and Maitland, *History of English Law* II [2d ed., 1899] 496), English law imposed the death penalty for the theft of objects exceeding 12d. in value. Juries since the fourteenth century avoided the application of the law by heavily undervaluing the things stolen. Holdsworth, *A History of English Law* III (4th ed., 1935) 367, see also Blackstone, *Commentaries* IV *238. The same phenomenon appears in the handling of the "benefit of clergy" (a more lenient punishment, originally reserved to clergymen and later extended to other delinquents, for some types of thefts not exceeding 40s. Blackstone, *Commentaries* IV *365-*374, *240). In 1732, a jury found two guinea and two half-guinea coins to be together worth less than 40s., and similarly in 1808 a £10 Bank of England note was valued at 39s. Kenny, *Outlines of Criminal Law* (15th ed., 1936) 208. As early as the beginning of the 15th century, Lyndwood, *Provinciale* (Oxford ed., 1679) 171, note a, raised the question whether certain jurisdictional amounts of ancient standing were to be computed on a gold basis.

42. Taeuber, *Molinaeus' Geldschuldlehre* (1928) 59; see also Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts-und Rechtslehre* I (1874) 184, at n. 67. Sometimes the expression *moneta imaginaria* is applied to units of account, *infra,* sec. 15 IV.

upon a miscellany of coins. It is a device which lends itself easily to misuses by the rulers. In England the scheme was finally put to good use when coins were made representing *livres* (pounds), *solidi* (shillings) and *denarii* (pence)—or simple multiples or fractions thereof—while at the same time the value of the pound was kept stable. The monetary body, as it were, waxed into the pre-established form, but this was an extraordinary achievement. Though the *moneta imaginaria* created some order among multiform moneys circulating in the same territory, it had a highly confusing effect when wealth and commerce grew. Great juridical efforts were made, especially during the fifteenth and sixteenth centuries, to meet the situation through invention of appropriate contract clauses,[43] but they only added to legal controversies.

The phenomenon of the *moneta imaginaria* is not confined to the West-European *libra*.[44]

III. Penal Law

The sovereign's prerogative in monetary matters is closely linked to the subject of monetary crimes. Penal law was called upon to protect and enforce that prerogative.[45] The rulers were confronted not only with outright counterfeiting but with more refined offenses such as "clipping", "washing", and other ways of "lightening" genuine coins. In the Germanic laws the original punishment for counterfeiting was the loss of the right hand,[46] a penalty also inflicted in England.[47] However, when the early

43. *Infra*, p. 18.

44. In the eighteenth century an "imaginary" rupee was established in East India on the advice of the famous economist Sir James Steuart. See the interesting report in F. A. Walker, *Money* (1891) 294. As to *moneta imaginaria* in American colonies, see *infra*, sec. 40 III.

45. Outstanding on this subject is Joseph Kohler, "Münzverbrechen und Münzvergehen" in *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts*, Special Part, III (1906) 203. The study exemplifies the achievements of this distinguished scholar who, apart from other merits, masterfully used the comparative method at a time when it was practically unknown to the juristic community. An excellent and compact discussion of the matter is also given by Babelon in *La Grande Encyclopédie* ("Monnaie"). See furthermore, Salvioli, *supra*, n. 2, at 74; Liszt, *Lehrbuch des Deutschen Strafrechts* (25th ed., 1927) 732; Ad. Wagner, *Sozialökonomische Theorie des Geldes und Geldwesens* (1909) 550; *Il Digesto Italiano* (1904-1911) XV, "Monete (contravenzioni concernente le)" by G. Guidi; Pertile, *Storia del Diritto Italiano*, V (1892) 547 [laborious but unilluminating listing of data].

46. Kohler, 204.

47. Pollock and Maitland, *History of English Law*, II (2d ed., 1923) 503. Hale's *Pleas of the Crown*, *supra*, n. 13, at ch. XVI–XX gave a detailed

economic system turned more monetary and the effects of counterfeiting were therefore more keenly felt, the law reacted with still greater severity. The alleged contempt shown by the criminal to the sovereign's image or emblem on the coin was ideologically and juridically a paramount motive in legal development. Counterfeiting and other monetary crimes were looked upon as *lèse-majesté,* a notion appearing first in the later phases of the Roman Empire [48] and evidently commanding the harshest retribution. This view was even extended to a creditor's refusal to take such coins as legal tender.[49] In 1351 Edward III declared counterfeiting of money "high treason"—characteristically—together with counterfeiting of the king's seal.[50] It is important to note that high treason included only a small number of the very gravest crimes, the punishment being death attended by gruesome tortures.[51] In France since 1347 the punishment was, for a long period, boiling to death.[52] While the various barbarous

historical account of the English penal law on money, bringing impressively into relief the tremendous contemporaneous significance of the subject.

48. Cod. IX 24; the broader concept of "sacrilege" was also applied to the crime. Pfaff in Pauly-Wissowa, *Realencyclopädie der Classischen Altertums-Wissenschaft,* Second Series, vol. I 1680, "Sacrilegium."

49. Case of Mixt Moneys, *supra,* n. 6, at 507 (Davis 18) refers to this theory. Other early monetary offenses were the exportation of gold or silver, melting down of coins, and the taking of a premium on coins, *infra,* p. 64.

50. Treason Act (25 Edw. III, Stat. 5, c. 2).

51. See Kenny, *supra,* n. 40, at 318. See also *infra,* p. 64, n. 30 [punishment for exportation of coins].

52. Guyot, *Répertoire de Jurisprudence* (1785), "Monnaies," 592. Babelon, *supra,* n. 45, tells this story: "Among the numerous trials of counterfeiters in the Middle Ages, records of which have been preserved for us in the public archives, certainly one of the most moving is that of the goldsmith Louis Secretain, condemned at Tours, 1486, to be boiled and hanged after having been convicted of the crime of counterfeiting. On the day of the punishment, Secretain was led from the prison to Foire-le-Roi Square, in Tours, where a huge caldron filled with water had been set upon a blazing fire. The unfortunate one was bound by the executioner and thrown into the caldron; but the water had not yet reached the boiling point and in his struggles the victim disengaged himself from his fetters. He reappeared on the surface of the water holding out to the crowd, which was speechless with pity, his suppliant arms and crying out 'Jesus! Mercy!' The executioner, armed with an iron fork, smote him on the head several times to make him sink again to the bottom of the vat. The crowd and the judges, themselves exasperated, cried at last: 'Death to the executioner!' An affray ensued in which the executioner was killed and Secretain rescued. The half-cooked unfortunate one was carried into a neighboring church where he found refuge until the king's pardon was

devices were abolished during the era of the Enlightenment or before, the death penalty was retained. As late as 1790 Congress declared counterfeiting of government securities a felony punishable by death.[53]

These stern rules of substantive law were supplemented by stringent procedural prescriptions, especially in France under the *ancien régime*. The ruthless methods of the régime led to tenacious resistance on the part of the people and this resistance was met by the establishment of enforcement machinery almost incredible in size. Its center was the *Cour de la Monnaie*,[54] succeeding in 1551 less elaborate institutions. The *Cour* was an appellate tribunal and at the same time an administrative agency. A contemporary writer[55] tells us that in 1785 the Court consisted of a Chief President, six Presidents, thirty Counselors, two Advocates General, and a Solicitor (Procureur) General. Even if allowance is made for a number of sinecures, the size of the institution is significant.

Juridical problems connected with counterfeiting of paper money came to the fore only in the nineteenth century. The evolution of a unified and sound legislative theory on counterfeiting as a single phenomenon was hampered by the outdated doctrine that bank notes (and perhaps other paper money) were not "money".[56] This is especially[57] true of English law where the term counterfeiting has been reserved for coins.[58] Similarly counterfeiting and other crimes concerning coins have been and are still considered as "offences relating to the rights and revenues of the crown" and in legislation are completely dissociated from "forgery" of "bank notes" and of "currency notes" which

brought at last, returning him his freedom."

53. Act of April 30, 1790, § 14, 1 Stat. 112, repealed by Act of March 3, 1825, § 17, 4 Stat. 115.

A significant piece of colonial legislation was a North Carolina Act which empowered "any person whatever to kill and destroy" counterfeiters who would not surrender within the limited time given for such surrender. Repeal of the Act was recommended in 1766 by the Privy Council, *Acts of the Privy Council of England, Colonial Series* V (1912) 38.

54. Guyot, *supra*, n. 52, at 593.

55. Guyot, *supra*, n. 52, 597. An impressive treatise: Abot de Bazingha, *Traité des Monnoies et de la Jurisdiction de la Cour des Monnoies* (2 vols., 1764) offers detailed information on the activities of the *Cour* and the subject matters involved.

56. *Infra*, p. 72.

57. In general, see Kohler, *supra*, n. 45, at 219.

58. See Russel *On Crime* (9th ed., 1936) I, 131, 134; *ibid.*, II, 1193, 1196, listing and construing the pertinent statutes.

is lumped together with forgery of wills and deeds—criminologically an entirely different type of delinquency. In the United States the homogeneity of the two types of crimes is clearly recognized. The provisions of the United States Code dealing with offenses against currency, coinage, etc., apply the term "counterfeiting" to both coins and paper money.[59] A number of States, too, have enacted penal legislation against monetary transgressions. That legislation was formerly necessary for the protection of state bank notes but was so broad as to duplicate to some extent the Federal provisions. Since Congress has been expressly entrusted by the Constitution [Art. I, sec. 8 (6)] "to provide for the punishment of counterfeiting the securities and current coin of the United States" the question of constitutionality of the State statutes has arisen.[60] Fortunately the problem is no longer real because only the Federal Government has been able to develop the specialized machinery and elaborate technical methods for the detection and prosecution of counterfeiters.[61] The States have therefore practically withdrawn from the field in this century even repealing earlier enactments.[62]

From a sociological point of view monetary crimes form a distinctive group.[63] Little stress is placed today on violation of the sovereign's prerogative. Still those crimes are crucially dangerous to public welfare because they are apt to undermine confidence in the currency. At the same time, counterfeiting demands a high degree of artistry—in fact it requires elaborate technical apparatus and is therefore for the most part undertaken by gangs. The whole atmosphere is apt to arouse the special interest of criminologists. Certain critical periods in the history of counterfeiting have even given rise to famous accounts by distinguished historians.[64] In the United States the crime has been rampant since

59. 18 U.S.C. 471, 485.

60. *Cf. Fox* v. *Ohio*, 46 U.S. 410, 433, 12 L.Ed. 213 (1847).

61. Investigation of counterfeiting is entrusted to the United States Secret Service, whose other main duty is the protection of the person of the President. The Federal Bureau of Investigation is not in charge.

62. Thus New York which once possessed an elaborate penal monetary law, has only preserved provisions against the possession of counterfeited coins and the advertising of such coins *(sic.)* N. Y. Penal Code, §§ 894, 895.

63. There are two able studies of this kind: Rhodes, *The Craft of Forgery* (1934) and fascinating, indeed, Lawrence D. Smith, *Counterfeiting, Crime against the People* (1944). See also *infra*, n. 68, Del Mar, *Barbara Villiers, or A History of Monetary Crimes* (1899) is concerned with one sensational case.

64. Macaulay, *History of England from the Ascension of James II* (1899 ed.), V 83; Gustav Freytag, *Bilder aus der Deutschen Vergang-*

the beginning of the Republic.[65] At variance with centuries-old tradition and for reasons difficult to explain[66] the attitude of American courts has been lenient.[67] When, during the Prohibition period, counterfeiting reached new highs, the government took strong counter-measures resorting to publicity and pressing in court for greater severity.[68] The campaign has been successful, without, of course, resulting in entire suppression of the crime.[69]

IV. Law of Money—Public or Private?

Does monetary law form part of public or of private law? The question is of much more interest to continental than to Anglo-American jurists. In continental law, ordinary law courts as a rule have jurisdiction only in private law cases; statutory rules frequently employ the terminology "private law" ("civil law", *"droit privé", "Bürgerliches Recht")* and "public law", and there is an elaborate differentiation between the two fields. The German *Reichsgericht,* in colonial legal tender cases, held that the law of money is public law and hence, under German colonial law, not applicable to the former German colonies.[70] Such a sweeping classification seems inappropriate, since the rules relating to money are scattered over the various fields of law—contract, administrative, constitutional, criminal, procedural, international, etc. The nature of the individual rule concerned should be examined. The question of the extent to which a creditor is under a

enheit III (1880), chap. 4; *cf.* also Stammler, *Deutsches Rechtsleben in alter und neuer Zeit,* I (1931) 185. All of them describe certain episodes of the seventeenth century.

65. The early reports of New York cases are full of instances.

66. The absence of violence in the crimes and a subconscious respect for artistry may have been factors.

67. This is a main theme in U. S. Treasury Dept., *Fines and Imprisonments in Counterfeiting Cases* (1935). The unconcern of the courts appears also to some extent in the narrow interpretation of the concept of "money," *supra,* p. 9, n. 33, and in acquittals on utterly formalistic and questionable grounds, *e. g.,* in *Dorsett's Case,* 5 City H.Rec. 77 (N.Y., 1820) and *People v. Quakenboss,* I Wheeler Cr.Cas. 91 (N.Y. 1822). See also Oliphant, 29 Yale L.J. 606, 613 (1920).

68. In addition to the scholarly essay cited above, the Treasury Department, through the U. S. Secret Service, published a popular study, *Know Your Money.* Lawrence D. Smith, *supra,* n. 63, wrote his book in cooperation with the authorities.

69. On the international law aspects of monetary crimes, *infra,* p. 321; on the private law aspects of counterfeiting, *infra,* p. 319.

70. Judgment of Nov. 28, 1923, *R.G. Z.* 107, 78. Same doctrine: Scaduto, *supra,* p. 7, n. 20, at 51; *contra:* Jung, *Das Privatrechtliche Wesen des Geldes* (1926).

duty to take "legal tender" in payment is undoubtedly one of private law.[71] The endowment of coins or notes with the character of legal tender is, however, an act of sovereignty, hence of public law. The issue was touched upon by the Supreme Court of the United States in *Ling Su Fan* v. *United States*,[72] as it happens, also a colonial case touching legal tender. The Court considered the question whether under the Due-Process clause, a prohibition to export coins constitutes a measure reasonably adapted to a permissible end. In this connection, it held that the creation of legal tender, as well as the limitation upon its use lies within the domain of "public law," since the limitation may be required by "public policy." The phrase "public law" is apparently not used by the Court in a technical sense, and certainly not in the sense of the continental concept of public law.

Generally speaking, the concept of "public law" in Anglo-American jurisprudence has no great practical significance, but is rather employed for purposes of literary and pedagogical classification. Even in the latter uses, its scope and meaning are doubtful.[73]

Section 4

LEGAL TENDER

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I. Historical Development

Legal tender[1] (in German: *gesetzliches Zahlungsmittel*)[2] is money which a creditor is not privileged to refuse if it is tendered

71. Accord: Bavarian Supreme Court, Oct. 15, 1930, *Die Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts im Jahre* 1931, p. 68, citing the present writer. Jerome, *Government and Money* (1935) 177, assigns the whole law of legal tender to the law of contracts, evidently an erroneous assumption.

72. 218 U.S. 302, 31 S.Ct. 21, 54 L. Ed. 1049 (1910).

73. See Pollock, *A First Book of Jurisprudence* (4th ed., 1918) 95; Holland, *The Elements of Jurisprudence* (13th ed., 1924) 128; Salmond, *Jurisprudence* (8th ed., 1930) 73.

1. For an able historical discussion of Anglo-American law, see Breckinridge, *Legal Tender* (1903). A tremendous number of American cases is compiled in Hunt, *A Treatise on the Law of Tender* (1903).

2. This is the term used in statutory language. See, e. g., *Bankge-*

by a debtor in payment of his debt. The concept is of universal validity. The Latin terms *(cours légal, corso legale, curso legal)* envisage the legal tender quality rather than the money itself. Compulsion upon the creditor which is inherent in legal tender can be created only by law. In modern times this is done by way of legislation [3] rather than of custom. Enactments of this type form part of "monetary" legislation which we have seen rests in the case of federations invariably with the federal government.

In addition to legal tender there may be non-legal-tender or refusable money.[4]

The development of an independent legal tender concept is a modern phenomenon. In general, up to the eighteenth century lawful money could be used in discharge of debts as a matter of course; proclamation of a novel coin by the Sovereign meant compulsion upon his subjects to receive it for the prescribed value.[5] The bank notes of England and France [6] appear to have been the first important European instances of a circulating medium which was not legal tender. In the American colonies a distinctive legal tender concept developed somewhat earlier.[7]

setz of August 30, 1924, § 3, par. 2, *R.G.Bl.* 1924 II 235; *Münzgesetz* of August 30, 1924, § 4, *ibid.*, 1924 II 254. German legislation, therefore, was compelled to distinguish *gesetzlich zugelassene Zahlungsmittel* [legally permitted media of payment; see decree of April 23, 1938 *R.G.Bl.* 1938 I 405, § 2] from "*gesetzliche Zahlungsmittel.*" Writers sometimes employ other expressions such as *Währung* (used particularly in earlier literature), *Währungsgeld, aufdrängbares Geld, zwangsläufiges Geld.*

3. The legal tender rule belongs basically to private law, *supra*, p. 45.

4. Ascarelli, *La Moneta* (1928) bases his whole inquiry upon the distinction of legal tender *(valuta)* and refusable money *(danaro)*, somewhat impairing the value of his able study.

5. The guinea is an exception. First coined in 1664, it did not become legal tender until 1717. Holt, C. J., in *Pope* v. *St. Leiger*, 5 Mod. 1 at 7, 87 Eng. Rep. 481 (1695/1696) admitting that "there was no proclamation to make them [the guineas] pass" held they were a "current coin of the kingdom". See also *Dixon* v. *Willows*, 3 Salk. 239, 91 Eng. Rep. 800 (1696).

6. The notes of John Law's *Banque Générale*, founded in 1716, were not legal tender; but the bank having been transformed, in 1718, into a "Royal Bank" the notes of the latter were given this privilege. Van Dillen, *History of the Principal Public Banks* (The Hague, 1934) 282 (contribution of Mr. Paul Harsin on La Banque et le Système de Law).

7. *Infra*, sec. 40 III.

While the legal tender experiment with paper money (colonial "bills of credit", John Law's adventure, Continentals, *assignats*) turned out disastrously, the notes of the Bank of England, without being legal tender, gained high reputation. This led governments, from the close of the eighteenth century, to be markedly hesitant in impressing bank notes with legal tender quality; it was the convenient redemption of the notes and the soundness of the bank's financial policy which induced people to receive the notes in payment.[8] In this country, for instance, national bank notes and Federal Reserve notes, despite their first-rate guaranties were not made legal tender until 1933. Notes of the *Banque de France,* founded in 1800, became legal tender, apart from the emergency period of 1848–1850, in 1870; the notes of the German *Reichsbank,* established in 1875, remained refusable until 1910.[9] These instances could easily be augmented.

English developments are particularly interesting. After being compelled, in the course of the Napoleonic wars, to suspend cash payments on the notes of the Bank of England, the English government caused an act to be passed in 1812, by which sheriffs enforcing the order of a court for the payment of money, were required to accept payment for the judgment creditor in bank notes.[10] This meant that a creditor who would enforce payment

8. This view found remarkable expression in a report made in 1806 by the "Tribunal" to the "Corps Legislatif," containing with regard to the notes of the Banque de France the following remarks: "*Ces billets n'auront jamais de cours forcé. Nous en avons pour gage la parole sacrée de* [Napoléon]. *Sa Majesté a voulu qu'il fut bien clairement exprimé que jamais aucun papier-monnaie, aucune altération des monnaies n'auraient lieu. Les billets de la Banque ne seront toujours, aux yeux de l'Etat, que des billets de confiance, et jamais il ne les reconnaîtra comme obligatoires.*" Mater, *Traité Juridique de la Monnaie et du Change* (1925) 101. On that "Tribunal" see Lavisse, *Histoire de France Contemporaine* III (1921) 225. Not until 1848 did the Banque emit notes below 500 fr. François-Marsal, *Encyclopédie de Banque et de Bourse* I (1930) 29, 30.

9. The notes of the *Preussische Staatsbank,* founded in 1775, and replaced in 1875 by the *Reichsbank,* were never legal tender. James Breit, *Das Bankgesetz* (1911) 5.

10. 52 Geo. III, c. 50 (1812); passed for one year and continued by 53 Geo. III, c. 5 (1812) and 54 Geo. III, c. 52 (1814). As early as 37 Geo. III, c. 45 (1797), a debtor tendering bank notes was to be discharged of arrest. In *Grigby* v. *Oakes,* 2 Bos. & P. 526, 126 Eng. Rep. 1420 (C.P., 1801), a creditor's claim for coin was allowed, Lord Alvanley, Ch. J., remarking (at 528), "Thank God few such creditors as the present Plaintiff have been found since the passing of the act!" This indicates the social operation of the Act, which was certainly further strengthened by the condemnatory utterance of the Chief Justice.

had to accept notes despite the fact that the notes could not be pressed upon him out of court. If the creditor preferred to wait until resumption of cash payments by the bank (which occurred in 1821) he would be entitled to gold. The effect of the Act was very similar to that of legal tender provisions, but at least appearances were preserved.[11] In 1833 the notes were made legal tender for as long as the bank should maintain their convertibility.[12] This formula, which met the main objection urged against legal tender notes, was left intact during World War I. Actual withdrawal of gold from the bank was practically prevented, however, by public declarations that a request for gold would help the enemy.[13] In 1928 the notes became unconditional legal tender.[14] Convertibility was abolished in 1931.[15]

Making government paper money—as distinguished from bank notes—legal tender did not meet with a similar doctrinal opposition. Evidently one can hardly cut off governments from this expedient indispensable in cases of war and other emergencies. The "greenbacks" of 1862 are in point. Hence doctrine split with regard to the two types of paper money; in fact, that differentiation extended beyond the legal tender issue.[16]

II. Limitations of Legal Tender

The legal tender feature may be limited in various ways. The most important limitation relates to "subsidiary" coins which, having a substandard metal content, are legal tender only within a maximum amount prescribed by law.[17] Thus for American half-dollars and the smaller silver pieces, the limit was ten dollars and for the minor (nickel and copper) coins, twenty-five cents,[18] until the Legal Tender Act of 1933 made "all coins and currency of the United States equally legal tender." [19] The sweep-

11. The peculiar provision of the Truck Act of 1831, 1 & 2 Wm. IV, c. 37, § 8 [acceptance of payment of wages in bank notes not compulsory] shows that this experience aroused a certain distrust.

12. 3 & 4 Wm. IV, c. 98, § 6 (1833).

13. Feavearyear, *The Pound Sterling* (1931) 304.

14. Currency and Bank Notes Act 1928, 18 & 19, Geo. V, c. 13, § 1(2).

15. 21 & 22 Geo. V, c. 46.

16. *Infra*, p. 72.

17. Where no definite limit is set by the law, even minor coins, if legal tender, must be received to the full amount of the debt. Cass., Dec. 21, 1903, *D.P.* 1906 I 64 [colonial case].

18. Acts of June 9, 1879, 21 Stat. 8, § 3 and of Feb. 12, 1873, § 16, 17 Stat. 427; 31 U.S.C. 459, 460. See also the English Coinage Act, 1870, 33 & 34 Vict., c. 10, § 4.

19. Act of May 12, 1933, 48 Stat. 52, § 43 as amended June 5, 1933, 48 Stat. 113, § 2, 31 U.S.C. 462.

ing language of the Act apparently does away with the former maximum amounts entirely.[20]

Another limitation relates to the debts which are subject to legal tender. Sometimes the law requires that customs or certain other public dues be paid in gold, which means limitation of the legal tender quality of other moneys.[21] Besides, private agreements may obligate the debtor to make payments in gold coins or silver coins respectively. Such agreements have met with judicial and legislative restriction.[22]

A peculiar limitation is presented where under the law a coin is legal tender according to its weight. An early, if not the earliest instance, is an English law of 1774,[23] which provided that silver coins should be legal tender up to £25. and above this amount by weight at 5 sh. 2d an ounce. The public could hardly be expected to accept, and apparently did not accept the weighing procedure.[24] The latter must probably be understood as a palliative comforting the public against what was in fact the legalization of a substandard subsidiary coin.[25] The legal-tender-by-weight device was applied to gold and silver coins by the American Congress in 1792, to the effect that such coins having lost more than the statutory "tolerance" must nevertheless be received according to their weight.[26] Presumably the intention was to keep as many gold and silver coins as possible in circulation. The Legal

20. There seems to be no protection for a creditor to whom, perhaps with bad intention, a tremendous amount of copper coins is tendered. A French creditor was fined for his refusal to accept copper coins for a debt of less than five francs, the statutory limit under French law. Cass. July 13, 1860, *D.P.* 1860 I 418. See also Cass., Nov. 9, 1861, *D.P.* 1861 V 270.

21. For instances, see *infra*, pp. 582, 583, and Scaduto, *supra*, p. 7, n. 20, at 62, n. 30.

22. *Infra*, secs. 18 and 19. The Act of Feb. 28, 1878, § 1, 20 Stat. 25, 31 U.S.C. 458, expressly allows contracts excluding silver dollars from payment.

23. 14 Geo. III, c. 42.

24. See Knapp, *Staatliche Theorie des Geldes* (1923) 291 and Kalkmann, *Englands Übergang zur Goldwährung im 18ten Jahrhundert* (1895) 72.

25. W. A. Shaw, *The History of Currency, 1252–1894* (1896) 231, 235; Feavearyear, *supra*, n. 13, at 156, 159. The tentative character of the law also appears in the fact that it was enacted for two years—it was repeatedly re-enacted—and in the excessive height of the £25 limit. By the so-called Lord Liverpool Coinage Act of 1816, 56 Geo. III, c. 68, the limit was lowered to 40 shillings. See Lord Liverpool, *Treatise on the Coins of the Realm* (reprinted ed., 1880) 144, and Laughlin, *Money, Credit and Prices*, I (1931) 153.

26. Act of April 2, 1792, 1 Stat. 246, § 16.

Tender Act of 1933 making all coins and paper moneys legal tender repeats the legal-tender-by-weight limitation for gold coins [27] which were then in the process of requisition. Congress perhaps wanted to support the international value of the dollar through that limitation. Actually, the weighing device is unworkable in modern society. Its application would destroy the monetary function of the coins.

Territorial limitations of legal tender, too, have occurred.[28] Even the precarious device of limitation in time is not entirely absent. Under inflationary conditions governments have sometimes resorted to the expedient of changing from time to time the amount up to which a money piece must be taken as legal tender [29] (legal tender by scale).[30]

III. Refusal of Money Tendered

Money rejected by a creditor may be legal tender or refusable money. In the latter case refusal makes the tender ineffective, but this is not necessarily so. Where refusable money circulates

27. The Act of May 12, 1933, § 43 (b) (1), 48 Stat. 52, was amended so as to include the reservation. Act of June 5, 1933, § 2, 48 Stat. 113, 31 U.S.C. 462.

28. Notes of Scottish and Northern Ireland banks are legal tender in Scotland and Northern Ireland, respectively. Currency Defence Act 1939, 2 & 3 Geo. VI, c. 64, § 2, par. 2. In the Kingdom of Italy the notes of certain banks of issue were legal tender only within definite sections of the country. Royal Decree of April 28, 1910, No. 204, *Raccolta Ufficiale* 1910 I 753; Greco, *Corso di Diritto Bancario* (2d ed., 1926) sec. 158. For other cases of territorial limitations, see *Reichsgericht*, Dec. 8, 1930, *R.G.Z.*, 131, 41, and Nussbaum, *Das Geld* (1925) 47 [former German colonies].

29. A Prussian decree of Oct. 29, 1807, following Napoléon's victory, made the Prussian treasury notes legal tender at a value to be published twice a month on the basis of stock exchange quotations (in addition, there was a maximum limit). Mylius, *Novum Corpus Constitutionum Prussico-Brandenburgiensium* XII 258 with "Instruction" of same date: Krug, *Geschichte der Preussischen Staatsschulden* (1861) 46. This regulation was repealed by decree of Feb. 11, 1809, Sobernheim, "Die Geldentwertung als Gesetzgebungsproblem des Privatrechts" in *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* LXVI (1923) 311. In France the Directory by decree of August 2, 1796 ordered quotations of the *mandats territoriaux* to be published every five days, but this referred only to payments to the Treasury; no legal tender was involved. *Bulletin des Lois* II 2, no. 607. According to Sobernheim (p. 294), a Russian decree of April 9, 1812 provided that the "banco-assignats" created in 1768, had to be accepted by creditors on the basis of daily stock exchange quotations, an obviously unworkable device.

30. The problem has been dealt with, though not successfully, by German writers. See particularly L. Goldschmidt, *Handbuch des Handelsrechts* I (1868) 1119, n. 9.

people are ordinarily unaware of the difference, believing all money to be legal tender. Courts have therefore shown an inclination to hold tender of refusable money good "unless specifically objected to" [31] and such objection is required to be very explicit.[32] Since in this country 90% of all payments are made by check, the same attitude has been taken with respect to the tender of checks.[33] However, a sheriff or other officer proceeding on a writ of execution cannot accept a check though drawn by a person of good financial standing, in discharge of the debt without the consent of the creditor. Courts have held the same way where refusable money was offered to the sheriff.[34] Apart from the analogy of payment by check, the whole matter of refusable money has now lost its practical significance. Almost everywhere all kinds of coin and paper money have become legal tender as a result of the abandonment of the gold standard.

In contrast refusal to accept legal tender has remained very important in legal theory and practice, not so much because creditors would question the legal tender quality of the money offered, but because they would refuse acceptance on such grounds as that the tender is too late, too early, or insufficient. A considerable body of law exists in that matter.[35] Where legal tender is refused, the debtor, if sued by the creditor, may pay

31. *Vick* v. *Howard*, 136 Va. 101, 116 S.E. 465 (1923); *MacLeod* v. *Hoover*, 159 La. 244, 105 So. 305 (1925). See, however, *Decamp* v. *Feay*, 5 Serg. & R. (Pa.) 323 (1819), and *Marrache* v. *Ashton* [1943] A.C. 311 (Pr. C.). The issue was novelized by A. Train, *Mr. Tutt's Casebook* (1936) 324.

32. *Bank of U. S.* v. *Bank of Georgia*, 10 Wheat. (23 U.S.) 333, 6 L. Ed. 334 (1825); *MacLeod* v. *Hoover*, *supra*, n. 31.

33. See Note, "The requisite medium in a tender of performance of an obligation to pay money," 76 U. of Pa. L. Rev. 433, (1928) and cases cited there particularly *Simmons* v. *Swan*, 11 F.2d 267 (C.C.A. 1st, 1926), *rev'd*, 275 U.S. 113, 48 S. Ct. 52, 72 L.Ed. 190 (1927), regarding a check certified by a reliable bank. A well-reasoned case in point is *Myers* v. *Associates Discount Corp.*, 60 N.Y.S.2d 691 (Broome County Ct., 1946).

34. *Randolph* v. *Ringgold*, 10 Ark. 279 (1850) [Arkansas bank notes]; *Gasquet, Parish & Co.* v. *Warren*, 2 Smedes & M. (10 Miss.) 514 (1844) [state bank notes]; *Harper* v. *Harvey*, 4 W. Va. 539 (1871); see *McKay* v. *Smitherman*, 64 N.C. 47, 50 (1870); Freeman, *Judgments* II (5th ed., 1925) 2328. *Contra: Governor* v. *Carter*, 3 Hawks (10 N. C.) 328 (1824) [current bank notes]; *Crutchfield v. Robins, Tingley & Co.*, 5 Humph. (24 Tenn.) 15 (1844) [current convertible bank paper]. *Cf. Boyd* v. *Sales*, 39 Ga. 72 (1869) [confederate currency]. Consequently the sheriff or other officers of the court should conduct a public sale only on a legal tender basis.

35. Williston, *Contracts* (rev. ed., 1938) sec. 1809.

the money into court and have judgment for costs. The payment operates as a discharge of the debt. Moreover, the simple tender automatically discharges security [36] and in some American jurisdictions will release the debtor from payment of further interest and costs.[37] In equity it prevents forfeiture and other prejudices stipulated for the contingency of nonpayment, and may be the basis of further relief; [38] thus a tender of money is equivalent to payment for satisfying the conditions precedent to specific performance.[39]

The theory of Roman law is different. It assimilates *mora creditoris* to *mora debitoris* (the proximate meaning of *mora* being "delay"). The *mora* of either creditor or debtor alters the rights and obligations of the parties. Originally the debtor in case of *mora creditoris* was held justified in ridding himself of the object owed, even by throwing it away, but this was changed in Roman law into a right of the debtor to deposit the object at the creditor's cost.[40] The notion of *mora creditoris* has been adopted by the German, Austrian and Swiss Codes,[41] and it turns up occasionally in Anglo-American law.[42] Still its value is questionable. The creditor, in failing to accept the payment due, merely refrains from exercising his right, but does not violate an obligation. Therefore he cannot be held liable for damages, at least under ordinary circumstances. Nevertheless, the Code solutions seem to be sound from a practical standpoint, in making a tender operate to stop interest and shift risks to the creditor; even tender by words will sometimes suffice for this purpose.[43] The French Code does not employ the *mora creditoris* device, but permits the debtor to offer the sum due the creditor through a sheriff or notary *("offre réelle")* and upon the refusal of the creditor to accept it, to deposit it with a governmental agency provided for that purpose *("consignation");* the consequence of the deposit is to discharge the debt.[44] Common law re-

36. For a complete collection of cases see "Unaccepted tender as affecting lien of real estate mortgage," 93 A.L.R. 12 (1934).

37. Williston, *supra*, sec. 1817.

38. Pomeroy, *Equity Jurisprudence* (2d ed., 1919) V sec. 2110.

39. Pomeroy, *Specific Performance of Contracts* (3rd ed., 1926) sec. 323.

40. Girard, *Manuel élémentaire de Droit Romain* (8th ed. by Senn, 1929) 692.

41. German Civil Code 293 et seq.; Austrian Civil Code 1419; Swiss Law of Obligations 91 et seq.

42. *Comings & Livingstone* v. *Powell*, 97 Vt. 286, 122 A. 591 (1923).

43. German Civil Code 294, 295, 300, 301. The Austrian and Swiss rules are not as elaborate.

44. French Civil Code 1257 et seq. It was followed by the Italian Civil

quires the debtor to "keep tender good", that is, after tender, to keep the tendered sum ready for the creditor and not to profit from it ("continuance of the offer").[45] This prerequisite is unknown to civil law, and is rather precarious.

Both system agree in not placing the creditor under a duty to give change if the debtor makes a legal tender of more than the amount of the debt.[46] An exception has been duly admitted by American courts to the effect that railways in selling their tickets should be prepared to give change within reasonable limits.[47] This obligation is obviously grounded on the obligation of common carriers to accept passengers and goods for carriage and would seem to be in harmony with foreign law.

Severe penalties were frequently provided for the non-acceptance of legal tender. From Marco Polo we learn that, in the 13th century, Chinese law made rejection of imperial paper money punishable by death,[48] and twenty years in chains or, in some cases, death was the penalty provided for the refusal to accept French *assignats*.[49] Early English law punished repudiation as lèse-majesté.[50] At the time of the American Revolution, non-acceptance of Continental notes was treated as an enemy act and sometimes worked a forfeiture of the debt.[51] The Latin Codes still preserve, although in a very attenuated form, penalties for the non-acceptance of legal tender.[52] Such provisions have not

Code of 1865, Art. 1259; the Code of 1942, Art. 1206, has resumed the Roman notion.

45. Cf. Williston, sec. 1816.

46. *Perkins* v. *Beck*, Fed.Cas. No. 10984 (C. C. D. C., 1830); Williston, sec. 1810; Page, *Law of Contracts*, V (2d ed., 1921) sec. 2865. Although frequently cited in support of this proposition, *Betterbee* v. *Davis*, 3 Camp. 70, 170 Eng. Rep. 1309 (1811), would not seem to be in point inasmuch as bank bills were not legal tender at the time of the decision, *supra*, p. 47.

47. *Barrett* v. *Market St. C. Ry. Co.*, 81 Cal. 296, 22 P. 859 (1889) [tender of a $5 gold piece held reasonable, especially as it was the lowest circulating gold coin]; *Jones* v. *Louisville & N. R. Co.*, 109 Miss. 655, 68 So. 924 (1915) [passenger tendered railway conductor a $100 bill with request that change be delivered only after they reached destination in large city; held that it was a jury question if the amount tendered was reasonable]. Cf. *Barker* v. *Central Park, N. & E. R. Co.*, 151 N.Y. 237, 45 N.E. 550 (1896) [a tender of a $5 bill in payment of a 5-cent fare may be refused as an unreasonable tender]. Apparently the duty to furnish change is not placed upon telegraph companies. *Dale* v. *Western Union Tel. Co.*, 181 App. Div. 292, 168 N.Y.S. 783 (1918).

48. Yule, *The Book of Ser Marco Polo*, I (3d ed., 1903) 423.

49. Decrees of August 1 and September 5, 1793, Duvergier, *Collection des Lois*, VI 80 and 181.

50. *Supra*, p. 44.

51. *Infra*, sec. 41 I.

52. French Penal Code 475(11), *su-*

existed in Anglo-American or in Central European law at least since the nineteenth century. Indeed, a creditor who does not take legal tender harms himself, since he is not entitled to anything else. The compulsion, however, assumes a new aspect when it is coupled with statutory "ceilings" which *invariably* make their appearance in emergency periods.[53]

IV. Non-Money as Legal Tender

It is a strange fact that commodities pure and simple have sometimes been made legal tender. Thus in ancient Rome during the civil war, Caesar decreed that creditors under certain conditions should receive movables and immovables of the debtor in lieu of money.[54] A similar measure providing for *datio in solutum necessaria* was adopted in the sixth century by the Emperor Justinian.[55] During the French Revolution payment of agricultural rents and certain other debts was permitted by law to be made partly in grains.[56] In these instances debtors were authorized to discharge ordinary pecuniary debts by goods not contracted for. While the scheme is not entirely unknown in the United States,[57] early Colonial legislation which declared corn, tobacco and other commodities legal tender was somewhat different inasmuch as it was occasioned by the general dearth of coin.[58] Contracts were then frequently made in terms of the legal-tender commodities. This was to some extent a non-monetary society, and for that matter comparable to conditions of primitives. Whatever the explanation, it is not correct to say

pra, p. 20; Italian Penal Code 693; Spanish Penal Code, 592.

53. See, e. g. for colonial times, Nettels, *The Money Supply of the American Colonies* (1934) 265, and for the French Revolution, A. D. White, *Fiat Money Inflation in France* (1923). The Rhode Island case, *Trevett* v. *Weeden* (1786), *infra*, sec. 41 V is in point.

54. References in Steiner, *Datio in Solutum* (1940), 161.

55. Steiner, *ibid.*

56. Decrees of 16 Frimaire, Year 2 (Dec. 6, 1793), Duvergier, *Collection des Lois* V 403; 28 Thermidor, Year 2 (Aug. 15, 1794), *ibid.* VII 303; 2 Thermidor, Year 3 (July 20, 1795), *ibid.* VIII 237. In Newfoundland a decree of August 18, 1825, permitted the discharge, by delivery of dry cod, of debts for supply of fishing gear. Mater, *Revue du Droit Bancaire* II (1924) 5 at n. 6.

57. About the time of the Peace with England of 1783, South Carolina made "property of every kind" legal tender, *Edwards* v. *Kearzey*, 96 U.S. 595, 24 L.Ed. 793 (1877), and as late as 1821 Missouri legislation tried to force upon judgment-creditors non-money property in discharge of their debts. *Baily* v. *Gentry*, 1 Mo. 164 (1822).

The "postal currency" of Civil War days was not really legal tender, *infra*, sec. 42 I.

58. *Infra*, sec. 40 II.

that legal tender is necessarily money. Grain is not money though by virtue of a statute it has been made legal tender.

In the light of such historical occurrences it is easier to see that legal tender is not necessarily money.[59] Hence non-circulatory commemorative coins will not become "money" by the fact that a statute makes them "legal tender" *honoris causa*, so to speak. When an English Jubilee five-pound gold piece of 1887 had been stolen from the owner a later bona-fide holder was rightly denied the protection guaranteed by law to the bona-fide holder of money. The Jubilee pieces had not been put into circulation and were therefore not money, but the court, embarrassed by their legal tender quality used a tortuous and questionable argument in order to reach the sound result.[60] Similarly where gold (or silver) coins, as a result of inflation, have definitely disappeared from circulation, they should no longer be considered as money, though they are still listed as legal tender in the statute books.[61]

V. Cognate Concepts

(A) The term "lawful money" was used by colonial legislators in the creation of such money types which made it highly desirable to assure the people that the new issues were really "lawful".[62] It had appeared in the same placating, and a bit suspect, sense in the famous Mixt Moneys case which dealt with Queen Elizabeth's debased coin.[63] In the United States, the old term has been preserved as a well sounding attribute of Federal paper money.[64] After having caused some slight trouble,[65] it has come to be understood simply as legal tender,[66] though there is still

59. Says *Vick* v. *Howard*, 136 Va. 101, 109, 116 S.E. 465 (1923): "All legal tender is money, but not all money is legal tender." This formula has often been repeated.

60. *Moss* v. *Hancock [1899]* 2 Q. B. 111 (Q.B.). The court deemed the piece to be "money" because of its legal tender quality, but evaded the application of the law of money on the ground that it was passed to the defendant, like an article of virtù, by sale. Actually, it had been passed on by exchanging it for coins of the same nominal amount, a monetary transaction.

61. *Infra*, p. 196.

62. *Infra*, sec. 40 III.

63. The case—*supra*, p. 33, n. 6—states in its first paragraph that the Queen declared the debased coin to be "lawful and current."

64. The Legal Tender Act of March 17, 1862, 12 Stat. 370, calls the "greenbacks" "lawful money and a legal tender." The vagueness of the term "lawful money" led to tortuous judicial discussion in *United States* v. *Johnson*, 26 Fed. Cas. 621, 623 (Cir. Ct., S.D. Ohio, 1877).

65. 17 Op. Att. Gen. 121 and 144 (1881); Hepburn, *A History of Currency in the United States* (1915) 326.

66. As correctly stated in Fed. Res.

controversy on the point.[67] Certainly the legislature would be well advised if it would drop the phrase entirely.

(B) Of much greater importance is another congener of legal tender—the *cours forcé (corso forzoso, Zwangskurs)*. This term signifies legal tender quality as applied to inconvertible paper money. It therefore contains two elements: (1) the legal tender rule regarding the payor-payee relationship; (2) the inconvertibility rule regarding the relationship between the issuer and the holder of the note. The term is particularly popular in French writings and its use is sometimes convenient. Seen from a legal viewpoint, however, it lacks accuracy in that legal tender as such brings about compulsory circulation of the legal tender medium.[68] Moreover the merger of two separate legal concepts into one term has served to confuse monetary theory.

Thus the opinion has been advanced, particularly in French cases and legal writings, that the legal tender rule and the *cours forcé* are confined to the territory of origin—that they are strictly "territorial" in character.[69] It is true that sovereignty, the basis

Bull. 1944, 234. See, e. g., 12 U.S. C. 121, 123, 131 (National Bank notes); 413, 441, 443, 445 (notes of the Federal Reserve System); and 31 U.S.C. 337, 338 (exchange of subsidiary and minor coin).

67. A Federal Reserve Bank, whose reserves may be kept in "lawful money" (12 U.S.C. 413), cannot include therein its own notes. This is a sensible interpretation of the *reserve requirement*, but is no reason to question the general quality of Federal Reserve notes as "lawful money" and to assert on this ground a diversity of "lawful money" and "legal tender." It is surprising that such a minor definitional issue should have given trouble to economists. Simmons, "Concept of lawful money," 46 Journ. Pol. Econ. (1938) 108; Cross, *ibid.*, "Note," 409; Spahr, "Problems caused by misconceptions" etc. in *Money and the Law* (ed. by New York University School of Law, 1945) 33, 35. See also *infra*, p. 72, n. 3.

68. In statutory language there is still uncertainty as to the use of the terms *cours forcé* and *cours légal*. See Mater, *supra*, n. 8, at 82; Gény, "Cours légal et cours forcé," *Revue Trimestrielle de Droit Civil* 1928, 1. Phraseology of courts, too, is not well settled. The two terms were interchanged, for instance by Cass., March 29, 1890, *Sirey* 1890 I 137 at 138, with critical annotation by Villey. The accurate terminology appears in the judgment of the same court, May 5, 1892, *D.P.* 1892 I 580, and in App. Paris, May 23, 1928, *J.D.Int.* 1928, 699.

69. See, e. g. Cass. Jan. 23, 1924, *J. D. Int.* 1924, 685; Mixed App. Alexandria, May 19, 1927, *ibid.* 1928, 765; Wharton-Parmele, *A Treatise on the Conflict of Laws*, II (3d ed., 1905), no. 517. The haziness and ambiguity of the notion of "territoriality" has been demonstrated by the writer in *Principles of Private International Law* (1943) 40, n. 23. More on the French doctrine *infra*, sec. 18 II. Under the system of *moneta imaginaria, supra*, p. 37, the *valor impositus*

of legal tender and *cours forcé,* does not operate beyond the frontiers of the state, but this fact does not justify the French doctrine. Suppose a New York creditor is entitled by contract to receive a payment in New York in pounds sterling. Evidently the New Yorker, under his contract, can be compelled to receive notes of the Bank of England in discharge of the debt. Business custom may entitle him to reject, as unfit for mailing, certain English coins which are legal tender. But generally everything that represents a pound sterling or a multiple or fraction of it under the law of England is good tender for the pound creditor in New York as well as in England. In this sense the English legal tender rule operates outside England.[70] Regarding *"cours forcé"* as distinct from legal tender, nonconvertibility of paper money operates upon the foreign holder exactly as upon the local holder.[71] For that matter, too, the "territoriality" notion is out of place. Recently the Italian Court of Cassation has taken a strong stand against the territoriality doctrine.[72]

(C) Refusable money may be assimilated with legal tender by obligating the government (or the central bank) to receive that

had, of course, no significance outside the territory of the decreeing ruler. Molinaeus, *Tractatus Commerciorum* (1546) [relying on Baldus].

70. The rule has been enunciated by English courts in the reverse situation, namely, with respect to the tender of non-English money owed in England. *British Bank for Foreign Trade, Ltd.* v. *Russian Commercial and Industrial Bank,* 38 T.L.R. 65 (Ch. 1921) [rubles]; *Re Chesterman's Trust-Mott* v. *Browning,* [1923] 2 Ch. 466, 483 [marks]; *Graumann* v. *Treitel,* [1940] 2 All. Eng. R. 188, 200 [marks]; see also *Ottoman Bank of Nicosia* v. *Chakarian,* [1938] A.C. 260, 278 (Pr. C., 1937) [Turkish pounds], and *Pyrmont, Ltd.* v. *Schott,* [1939] A.C. 145 (Pr.C., 1938) [pesetas]. Even French courts have recognized the legal-tender effect, in France, of German and Italian unredeemable notes, *infra,* sec. 33, n. 45, and, generally, the international effect of foreign devaluation, *infra,* sec. 24 IV.

71. International tribunals have dismissed claims for damages incurred through establishment of the *cours forcé* [discontinuance of gold redemption of bank notes]. Germano-Polish Arbitral Tribunal for Upper Silesia (instituted by Treaty of May 15, 1922), Dec. 19, 1930, in *Müller* v. *Deutsches Reich, Entscheidungen des Schiedsgerichts für Oberschlesien* II (1932) 34 and Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942) 592; American-British Claims Commission (instituted by Treaty of May 8, 1871) in *Adam's Case,* reported by Moore, *International Arbitrations,* III (1898) 3066 [depreciation of dollar bonds resulting from the Legal Tender Acts, *infra,* sec. 42 I.]

The views expressed in the text are subject to modification in the case of exchange control. *Infra,* sec. 31 IV.

72. Judgment of Feb. 2, 1939 *Giursprudenca Italiana* 1939 I(1)446 [*cours forcé* of German banknotes binding upon Italians].

money in payments due to the government while private creditors are not placed under a like obligation. Such "public receivability" [73] of refusable money was a familiar phenomenon prior to the recent generalization of the legal tender rule,[74] particularly because governments hesitated to force bank notes as legal tender upon the public. "Public receivability", which provides a very strong inducement for general acceptance was a welcome substitute. Its effectiveness was impressively demonstrated in 1923 when the German government by the issuance of *Rentenbankscheine* which were publicly receivable bank notes, succeeded in overcoming one of the most pernicious inflations in history.[75]

The noted German economist Knapp tried to explain public receivability by the hypothesis of a conditional debt owed by the government to the holder of the money tendered, the condition being that the holder becomes a debtor to the government. Payment of receivable money to the government would therefore involve the familiar phenomenon of a set-off.[76] Yet Knapp's hypothesis is overartificial. Apparently he lacked the concept of "legal power",[77] in the present case: of the "power" of the money holder to use the money in discharge of his debt. The holder of legal tender possesses an analogous power effective against any creditor. In neither case does the payment involve a "conditional debt" owed by the payee and a subsequent set-off. It is noteworthy that an economist should have advanced this example of juristic hairsplitting.

73. German law, for this concept, has an accepted term, "*Kassenkurs*."

74. See, e. g., Act of Dec. 23, 1913, § 16, 38 Stat. 251, 265, 12 U.S.C. 411 [Federal Reserve notes] and Acts of Feb. 28, 1878, § 3, 20 Stat. 25, 26 and March 3, 1887, 24 Stat. 509, 515, 31 U.S.C. 405 [silver certificates]. The notes of the first and second Bank of the United States (*infra*, sec. 41 V) were likewise vested with public receivability. Acts of Feb. 25, 1791, § 10, 1 Stat. 191, 196; and of April 10, 1816, § 14, 3 Stat. 266, 274.

In *Woodruff* v. *Trapnall*, 10 How. (51 U.S.) 190 (1850), it was held that a State may give bank notes public receivability with the State treasury, but this no longer has practical significance. American law knows a reciprocal type of public receivability where the Government is not only obligated to receive that particular kind of money, but may also force it upon its creditors. See 41 Stat. 387 (1920), 12 U.S.C. 109, regarding national bank notes [reciprocal receivability subject to certain exceptions]. This type of receivability goes back to the "commodity money" of early colonial times. Nettels, *The Money Supply of the American Colonies before 1720* (1934) 209 and *infra*, sec. 40 II.

75. *Infra*, sec. 13 IV.

76. Knapp, *The State Theory of Money* (1924) 154.

77. Cf. Hohfeld, *Fundamental Legal Conceptions* (1934) 36, 50.

(D) Finally, one might speak of a "mock legal tender" device which consists of legislation rolling stumbling blocks into the way of a creditor who would not receive refusable money. The English example of 1812 is not isolated.[78]

Section 5

COINS AND BULLION

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I. History and General Rules

Coins are metal plates bearing surface authentication of their weight and fineness and designated for circulation within the community.[1] The first coins seem to have appeared in Asia Minor during the seventh century B. C. The social implications of the genesis of metal money have been the subject of much reflection and writing.[2] Aristotle—in a famous passage of his "Politics" [3]—points out the inconveniences of barter accomplished merely by exchanges of the most diversified useful goods; therefore, man, in the opinion of the philosopher, "contrived" a medium of exchange (such as iron or silver) which, while valuable in itself, could easily be passed from hand to hand in exchange

78. Cf. the Kentucky legislation discussed in *Briscoe* v. *Bank of the Commonwealth of Kentucky*, 11 Pet. (36 U.S.) 257, 9 L.Ed. 709, 928 (1837), *infra*, sec. 41 at n. 74.

1. In *Gordon* v. *Magone*, 40 F. 747, 750 (C.C.S.D.N.Y., 1889), dealing with Chinese taëls, which are shoe-shaped pieces of silver, it was held that date of issue, name or insignia of sovereign and penalty for counterfeiting, are not essential to the concept of coin.

2. The following are the more important studies on the origins of money: A. R. Burns, *Money and Monetary Policy in Early Times* (1927), chap. i and ii; Ridgeway, *The Origin of Metallic Currency and Weight Standards* (1892); Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2nd ed., 1926) 172; *Reallexikon der Vorgeschichte*, ed. by Ebert (1926), "Geld"; Babelon, *Les Origines de la Monnaie* (1897). Regarding the detailed and well-illustrated account by Laughlin. *Money, Credit and Prices*, I (1932), chap. i, see *supra*, p. 18, n. 69. For the economic and technical aspects of coinage, *cf.* Ad. Wagner, *Sozialökonomische Theorie des Geldes und Geldwesens* (1909). Quiggs, *A Survey of Primitive Money* (1949) and Einzig, *Primitive Money in its Ethnological and Economic Aspects* (1949) were not yet available to the writer at the time of the printing of this volume.

3. *Politics*, I, c. 9.

(seigniorage, brassage) was inaugurated by England in 1666.[9] for the necessities of life. This rationalistic explanation has prevailed for two millenia, yet within the last century theories of an ethnological character have been advanced. According to them, the earliest media of exchange were various types of cattle, particularly oxen or sheep; furthermore, skins, grains, shells and other objects, generally valuable to primitive man, who is largely motivated by magic. Magic seems to have been a factor, for instance, in the money-like use of cowry-shells [4] among the most diverse races and, in fact, on several continents. During the intermediate phase between these "commodity moneys" and the early coinage era, various types of metallic media of exchange made their appearance, among which gold and silver bars representing definite weights were closest to coins. Commodity money was legalized in the early period of the American Colonies [5] and turns up even in modern colonial legislation.[6]

Mystery also surrounds the genesis of coinage. Temples played an important role in its first stages. A scholarly German study on "Sacred Money" explains the stamps found on the earliest coins in terms of totemistic symbolism.[7] However this may be, the social process in which money originated was much more complex and less rational than Aristotle knew.

The development of coining technique has been extremely slow. The bulk of circulatory coinage was on the whole in very bad shape until the nineteenth century, offering a strong incentive to clipping and counterfeiting. While we are not concerned with minting technology, it may be mentioned as an aspect of American monetary history that in the latter part of the eighteenth century the "milled" edge as a protection against clipping was not yet a common feature of the Spanish dollar, an outstanding coin.[8] In the legal field, abolition or limitation of mint charges

4. A. R. Burns, *supra*, at 4.

5. *Infra*, sec. 40 II.

6. Neumeyer, *Internationales Verwaltungrecht* III Part II 3 (1930) 240, n. 8, gives an instance of 1913 [German ordinance for New Guinea envisaging shell money]. Numerous earlier instances in R. Chalmers, *History of Currency in the British Colonies* (1893) passim.

7. Laum, *Heiliges Geld, Eine Historische Untersuchung über den Sacralen Ursprung des Geldes* (1924). The critical remarks by Burns (*supra*, n. 2) 6, do not gainsay the theory that the priesthood may have contributed to the development of the primitive monetary unit.

8. *Infra*, sec. 41 I. Cf. also Wagner, *supra*, n. 2, at 489.

9. 18 Car. II, c. 5 (1666). See *International Monetary Conference* (1879) 309, "Statutes establishing free and gratuitous coinage in England"; Feavearyear, *The Pound Sterling* (1931) 109, and tables *ibid.*, pp. 346, 347. The statute of 1666 disallowed any deduction in the minting of gold coin.

In later times statutes would also define the maximum overweight or underweight ("remedy") allowed in the process of minting.[10] Laws of the nineteenth century likewise regulated "tolerance", that is, the maximum of abrasion allowed in the ordinary circulation of legal tender coins; according to this conception coins worn beyond "tolerance" are no longer legal tender. In this country tolerance amounted to ½% for gold coins.[11] The loss by abrasion in excess of tolerance ordinarily falls on the last holder of the coin.[12] Where such tolerance is not fixed by law, a coin will be legal tender as long as it is recognizable as lawful coin of the country. This ruling was laid down in an American case which indicates the possible practical bearings of the question. The conductor of a streetcar ejected a passenger who had offered as fare a silver ten cent coin worn by natural abrasion but retaining the appearance of a coin duly issued by the United States mint. The court allowed the passenger damages against the streetcar company.[13]

Ordinarily, in the making of coins, gold and silver are mixed with a baser metal ("alloy") for the sake of durability. If the alloy amounts to one-tenth of the whole weight ("standard weight"), the coin is "of nine-tenths fineness". In determining the value of the coin, one takes into account only the pure metal.[14] This metallic or intrinsic value must be distinguished from the nominal (extrinsic) value.[15] The classical gold standard calls for "free coinage" of gold coins, a principle embodied in

10. Cf., e. g., English Coinage Act, 1870, 33 & 34 Vict. c. 10, § 11(3) and First Schedule of the Act. Generally, Wagner, *supra*, n. 2, at 487.

11. Act of Feb. 12, 1873, § 14, 17 Stat. 424 at 426, 31 U.S.C. 318, 457, (See, however, as to the legal-tender-by-weight rule, *supra*, p. 49). Cf. furthermore English Coinage Act, 1870, 33 & 34 Vict., c. 10, §§ 3 and 4; German *Münzgesetz* of 1924, § 6, par. 2 (2-½ thousandths as to weight, 2 thousandths as to fineness). On mutilated coins see 31 U.S.C. 420. The data on French law are given in Dalloz, *Répertoire Pratique* (1920), "Monnaie et Médailles," no. 30.

12. Under the German *Münzgesetz*, § 11, par. 3, and § 12, the loss of wear and tear was borne by the government. The English Coinage Act, 1870, § 7, places upon the recipient of a gold coin which is underweight a duty to deface such coin, the loss to be borne by the person who tendered the coin. As to recoinage see F. A. Walker, *Money* (1891) 209.

13. *Jersey City & B. R. Co.* v. *Morgan*, 160 U.S. 288, 16 S.Ct. 276, 40 L.Ed. 430 (1895) [affirming, on procedural grounds, the judgment of the lower court]. A similar case involving nickel coin is *Cincinnati Northern Traction* v. *Rosnagle*, 84 Ohio St. 310, 95 N.E. 884 (1911). See also "What money is legal tender," 31 A.L.R. 246, 247 (1934).

14. *Collector* v. *Richards*, 90 U.S. 246, 258, 23 L.Ed. 95 (1875).

15. *Supra*, n. 24.

many monetary laws. Free coinage does not signify coinage free of charge but rather a policy under which everybody is entitled to have his metal coined by the mint.[16] In England and the United States, under the gold standard, gold coinage was "free" as well as gratuitous.[17]

Not all coins are coins in the proper legal sense, that is, "money coins". Coins may never have become money because the issue did not enter circulation; [18] or they may have been demonetized through definitive disappearance from circulation, either as a result of government intervention or of inflation.[19] Besides, a specific coin may lose its character as money by excessive abrasion or by individual action (defacing, melting, etc.). It is remarkable that such action is not generally prohibited in modern law. On the contrary, liberty to melt down gold coins is an element of a perfect gold standard.[20] Nor was there need to prohibit individual destruction of coins of baser metal, because in an orderly functioning monetary system the value of the metal in such coins was less than their nominal value. This liberty has generally become the victim of inflation and its aftermath. In this country it has been suppressed with regard to gold coins,[21] but other coins are not so protected.[22]

"Trade coins" are a phenomenon of international relations. They may be money abroad, but ordinarily are not money at home.[23]

II. Fiduciary and Fractional Coins

Money which is issued for a nominal value higher than the value of the material used is commonly spoken of as "fiduciary"

16. Act of Feb. 12, 1873, 17 Stat. 424, § 20, 31 U.S.C. 327: "Any owner of gold bullion may deposit the same at any mint, to be formed into coin or bars for his benefit"; English Coinage Act, 1870, 33 & 34 Vict., c. 10, § 8; German *Münzgesetz* of August 30, 1924, *R.G.Bl.* 1924 II 254, 7, par. 2; Austrian law of August 2, 1892, *Reichsgesetzblatt* 1892, n. 126 [inaugurating the Austrian *Krone*], Art. 8.

Coinage itself is a prerogative of the government, *supra*, p. 34.

17. Act of Jan. 14, 1875, 18 Stat. 296, 2, 31 U.S.C. 333; English Coinage Act, *l.c.*

18. *U. S.* v. *Barnard*, 72 F.Supp. 531 (W.D. Tenn., 1947).

19. *Supra*, p. 55.

20. *Infra*, p. 119.

21. Gold Reserve Act of Jan. 30, 1934, 48 Stat. 340, §§ 3 and 4, 31 U.S.C. 442, 443; U. S. Treasury Dept., "Regulations Issued under the Gold Reserve Act of 1934," *Code of Federal Regulations*, Title XXXI, Part 54.

22. Apart from fraudulent machinations, 18 U.S.C. 331.

23. *Infra*, sec. 21 III.

or "token" money in contradistinction to "full-bodied" money. While the expression "fiduciary money" is suggestive and needs no explanation, the term "token money", despite its wide use, is less fortunate. If one means thereby a token of the ideal unit, full-bodied money is also a token; and if a token of money is meant, the phrase is misleading, since fiduciary money is real money and not merely a token of it.

Fiduciary money may be of coin or paper. In the first group the main types are the subsidiary or fractional coins (*billon; monnaie subsidiaire,* or *divisionnaire; Scheidemünze).*[24] Their metal content is substandard. To give an instance, in the United States the silver dollar contains 412½ grains of standard weight silver, whereas the subsidiary half-dollar, quarter and ten-cent coins are made in respective fractions (½, ¼, 1/10) of 385⅘ grains. The silver dollar is not subsidiary and was at the time of its creation and long afterwards "full bodied". Owing to the depreciation of silver, which began in 1873, the silver dollar became "fiduciary," though not "subsidiary" money,—similarly as other silver coins [25] which came to be incorporated in foreign gold standard systems.

Subsidiary coins are legal tender only in limited amounts.[26] However, the holder is frequently entitled to have the coins exchanged for unlimited legal tender, provided the fractional coins offered for exchange represent the minimum provided by law. For example, this right is vested in the holder of $20 in subsidiary silver coin, the exchange to be made by the United States Treasury.[27] Although the traditional terminology is different, the legal situation is exactly the same as in the case of redeemable paper money, except that the chose in action is evidenced by a metal plate rather than by a sheet of paper.

24. In American legislation non-silver subsidiary coins are called "minor coins". 17 Stat. 424 at 427, §§ 16, 17; 31 U.S.C. 317. An able study on minor coins under French law has been published by Sigogne, *La Théorie Juridique de la Petite Monnaie* (thesis, Paris, 1942).

25. For example the German *thaler, Münzgesetz* of July 9, 1873, *R.G.Bl.* 1873, 233.

26. *Supra,* p. 48.

27. Act of June 9, 1879, §§ 1, 2, 21 Stat. 7, as amended by Act of May 29, 1920, 41 Stat. 631 at 655, 31 U.S.C. 337, 338. As a result of the nationalization of gold the Treasury can give in exchange only Federal Reserve notes, United States notes, or silver certificates. As to minor coins, redemption is discretionary with the Secretary of the Treasury. Act of April 24, 1906, 34 Stat. 132, 31 U.S.C. 341.

III. Restriction of Ownership

While Pothier's theory vesting property of coins in the sovereign has long lost credence, one must admit that coins—and the same is true of paper money—are in a distinctive way, and much more than other things, subject to restrictive measures on the part of the sovereign. Some of the old devices: debasing, decrying and raising the coin have been abandoned, or perhaps replaced, by the more subtle and more incisive technique of devaluation which, however, relates to the monetary unit rather than to coins as such.[28] Withdrawal of legal tender quality from a coin, an action comparable to the former practice of decrying, has been rare in modern times.[29] Prohibitions against the exportation and importation of coins,[30] of melting down [31] and selling at a premium *(agiotage)*,[32] however, are common to past and present. Still the prohibitions have changed their character. They are no longer primarily motivated by fiscal need but more by considerations of public welfare. A novel restrictive measure was taken—though temporarily only—during the Civil War by the prohibition of forward transactions in gold.[33] The most drastic encroachment upon the circulation of gold coins is the product of recent development: the wholesale requisition of the entire

28. *Infra*, sec. 13 III.

29. An instance would be the Joint Resolution of July 22, 1876, 19 Stat. 215, withdrawing the legal tender quality from the trade dollar. The German thalers offer another example. Cf. the writer's *Das Geld* 100, n. 5. Such withdrawal has been more frequent with regard to foreign coins, *infra*, sec. 21 II.

30. From the fourteenth century on, laws against export of coin and bullion became a significant part of the commercial regulations of England. Feavearyear, *The Pound Sterling* (1931) 3, and the same is true of the American colonies. Bullock, *Monetary History of the United States* (1900) 24. W. A. Shaw, *The History of Currency* (1896) 17, discussing the practices of the fourteenth and fifteenth centuries, mentions that "prominent London merchants were drawn and quartered" for the offense of having exported gold. While punishment was mitigated, the prohibition itself was not repealed until 1819. 59 Geo. III, c. 49. An early case concerned with a foreign (Portuguese) prohibition of gold exportation is *Boucher* v. *Lawson*, Cas. Temp. Hardwicke 85 and 194, 95 Eng.Rep. 33 and 125 (K.B. 1735).

In recent times prohibitions of export of gold and gold coins have appeared everywhere. League of Nations, *Document* C 323, M 159; 1930 II 29, "Legislation on Gold," p. 36.

31. Such a law was enacted in England as early as 1335. 9 Edw. III, St. 2, c. 3. A recent instance is the French Law of Oct. 20, 1919, *D.P.*, 1920 IV 273 (affecting all French coins).

32. Examples are 25 Edw. III, c. 12 (1350); 5 & 6 Edw. VI, c. 19 (1562); French laws of Feb. 12, 1916, *D.P.* 1916 IV 323, and Oct. 16, 1919, *D.P.* 1920 IV 272.

33. *Infra*, sec. 42 at n. 11.

gold holdings of a nation. In this country it was ordered after some preparatory measures by the Gold Reserve Act of January 30, 1934.[34] Steps taken by other governments were not quite as sweeping,[35] but to all intents and purposes, gold coins have everywhere disappeared from circulation. Soviet Russia has never recognized private ownership of gold and silver coins or of foreign exchange.[36]

In civil law countries the jurisdiction of the courts is not broad enough to permit judicial challenge of monetary measures taken by the government in the exercise of its supreme power. In common-law countries the situation is somewhat different, especially in the United States under the "Due-Process" clause of the Constitution. But even in this country the rule is well settled that there are attached to private ownership in coins "those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange". In accordance with this rule, the Supreme Court in *Ling Su Fan* v. *United States* upheld a Philippine statute which prohibited the export of silver coins from the Philippines so that the owners of the coins were prevented from profiting by their higher value in China.[37] In the Gold Clause Cases, the requisition of gold coins and of gold certificates was approved by the same Court.[38]

Coins which have not been surrendered to the government within the deadline proscribed by the law may be forfeited.[39] While compensation for requisitioned coins is generally granted,

34. 48 Stat. 337, § 6, 31 U.S.C. 441; U. S. Treasury Dept., Provisional Regulations, *supra*, n. 21.

35. In England the holder of gold must offer it to the Treasury; title passes either by sale or by specific direction of the Treasury. The points of departure are the Defence (Finance) Regulations, 1939, part of the Emergency Power (Defence) Act, 1939, S. R. & O. 1939, no. 930. For details see Mann, "Exchange Restrictions in England," Modern L.Rev., III (1940) 202, 206. In France the Monetary Law of 1936 ordained delivery of gold to the *Banque de France*, but free circulation of gold was restored by the law of February 18, 1937, *D.P.* 1937 IV 65. See Capitant, "La libre circulation de l'or sous le régime du cours forcé," *D. H. Chronique* (1937) 21. New restrictions of a rather half-hearted nature were introduced by ordinances of Oct. 7, 1944, *J.D.Int.* 1940–1945, p. 260, and of Jan. 17, 1945, *ibid.*, 279. On Swiss law, *infra*, p. 79, n. 29.

36. Soviet Civil Code 22, 23, 24.

37. 218 U.S. 302, 31 S.Ct. 21, 54 L. Ed. 1049 (1910). See also *supra*, p. 45, n. 72.

38. *Nortz* v. *U. S.*, 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907 (1935).

39. Gold Reserve Act of Jan. 30, 1934, 48 Stat. 340, § 4, 31 U.S.C. 443. An instance is *Schmidt* v. *Twin City State Bank*, 151 Kan. 667, 100 P.2d 652 (1940).

the amount recoverable is in controversy. In *Nortz* v. *United States* where gold certificates were involved, the Court denied recovery beyond the face amount which the government had already paid to the plaintiff in paper dollars. The plaintiff insisted that gold was bought and sold at higher prices in world markets. The Court pointed out, however, that the plaintiff had no right to resort to such markets, since Congress could and did prohibit exportation of and dealing in gold and gold coins.[40] It would perhaps seem natural that the government, having by its own action destroyed the free gold market, should be estopped from pleading this fact in its favor. But this is answered by the argument that a government cannot be made responsible or liable to an individual for acts done in the exercise of its sovereign legislative power.[41] The argument is just as conclusive against a nonresident alien.[42] Indeed a person who takes his gold coins into a foreign country subjects himself, as to those coins, to the monetary policy of that country.

No indemnification is warranted where the restriction imposed upon the owner of the coin consists only of a prohibition against exporting.[43] The same view applies to other legitimate restrictions short of requisition (e. g., to compulsory registration of gold).[44]

IV. Bullion

Gold bullion is a commodity,[45] but one very closely related to money. The use of gold as a legal basis for the issuance of paper

40. 294 U.S. 317, 55 S.Ct. 428, 79 L. Ed. 907 (1935). The Court furthermore argues that the dollar was not yet devalued at the time of the delivery of the gold certificates (January 17, 1934), the devaluation having been proclaimed not earlier than January 31, 1934. On this question, *infra*, secs. 13 II, 19 II.

Transfer of the gold premium to the government may also be achieved by taxation. This was done in France, Law of October 1, 1936, §§ 10 to 14, *D.P.* 1936 IV 393.

41. *Horowitz* v. *U. S.*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736 (1925).

42. See *British-American Tobacco Co.* v. *Federal Reserve Bank of New York*, 104 F.2d 652 (C.C.A.2d, 1939).

43. *Ling Su Fan* v. *United States*, *supra*, n. 37.

44. As, for instance, by the French Ordonnance of Jan. 17, 1945, *J.D. Int.* 1940, 45, p. 279.

45. As a commodity gold comes under customs regulations though it is duty-free, *U. S.* v. *Kushner*, 135 F.2d 668 (C.C.A.2d, 1943); its production is a "production of goods for commerce" within the Fair Labor Standards Act of 1938. *Fox* v. *Summit King Mines*, 143 F.2d 926 (C.C.A.9th, 1944).

On gold clauses, *infra*, secs. 15 to 19, 29 to 30; on valuation of gold, *infra*, secs. 17 IV, 38 II.

money is and has been more important than its coinage. Even if not used as a reserve against paper money, gold held by the government or the central bank has a potential monetary power as a means of increasing the volume of paper money or as a medium for the settlement of international balances. In fact only a fraction of the gold produced serves non-monetary purposes.[46] Regulation of transactions in gold, therefore, falls undoubtedly under the "monetary" powers of Congress or of other federal legislatures.[47] The restrictions discussed above on ownership of gold coins all apply equally to gold bullion.[48] This was true in the past also.[49]

Gold bullion mostly takes the form of ingots held by central banks or governments; in this respect governments avail themselves of central banks as their agents.[50] Ingots and other pieces of gold are subject to the general law on personal (movable) property especially regarding title.[51] Transfers occur primarily

46. The Interim Report of the Gold Delegation of the Financial Committee, League of Nations, *Documents, C* 375, *M* 161; 1930 *II* 26 *p.* 14, shows that at that time more than half of the annual production was absorbed for monetary purposes. In 1935 the industrial consumption of gold was estimated as 10 percent of the annual total production, League of Nations, *Statistical Yearbook 1934–35*, p. 241. This figure is certainly too high for the present. Soviet production, the size of which is unknown, serves monetary purposes presumably even to a greater degree than the production of other countries.

"Monetary gold" looted by the Germans in World War II was the concern of the Final Act of the Paris Conference on Reparations of Dec. 21, 1945, *Dept. of State Bulletin* 1946 I 114; cf. *Dollfus, Mieg et Compagnie S.A.* v. *Bank of England* [1949] 1 Ch. 369, a jurisdictional decision, referring on p. 372 to an official definition of the term "monetary gold."

47. *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 107 F.2d 965, 971 (C.C.A.8th, 1939); *British-American Tobacco Co.* v. *Federal Reserve Bank of New York*, 104 F.2d 652 (C.C.A.2d, 1939). However, one might question the Court's assertion in the latter case that gold coins are "no more than gold measured accurately."

On the power of the International Monetary Fund over gold transactions, see, *infra*, sec. 38 II.

48. League of Nations, "Legislation on Gold", *supra*, n. 30, compiles legislation mainly on gold redemption of paper money.

49. A particular restriction on bullion in the mercantilist era consisted in the prohibition of employing gold and silver for other purposes than for monetary circulation. Dandine, *Le Rôle de l'Etat en Matière Monétaire* (thesis, Paris, 1939) 26. This rule, too, has been revived under modern exchange control through the licensing system *infra*, sec. 31 II.

50. The agent of the United States Treasury is the Federal Reserve Bank of New York. See, e. g., *Banco de España* v. *Federal Reserve Bank of New York*, 114 F.2d 438, 440 (C.C.A.2d, 1940).

51. As a result of political changes

in connection with settlements carried out between central banks. The transfer must satisfy the general requirements of the law regulating the transfer of personal property, including the possible requirement of a license for gold. If the transfer is related to several countries the law of that country prevails where the bullion was situated at the time when the alleged transfer occurred.[52] In legal theory a special problem is raised by the fact that in order to save costs and risks of transportation, transfers of bullion are being made by way of "earmarking",[53] through book entries and other evidential measures effectuating transfer of title under the local law. The practice of earmarking gold,[54] especially for foreign governments is generally followed in the United States, but the legal forms used in the proceeding have not transpired.[55] More information is available regarding a similar

brought about by war or revolution, controversies have repeatedly taken place between central banks or governments claiming title in gold holdings. There is only one instance in which a judgment was rendered on the merits: *Banque de France* v. *Chase Nat. Bank*, 60 F. 2d 703 (C.C.A.2d, 1932). This was a replevin of gold bars which the plaintiff contended had been unlawfully seized from the plaintiff and transferred to the defendant by the Soviet Government. Judgment went to the defendant on evidentiary grounds. In the other cases judgment was confined to questions of jurisdiction. In the *Banco de España* case, *supra*, n. 50, the plaintiff tried to recover silver bullion sold by the Republican Spanish Government to the United States Government. Furthermore, during World War II assignees of the Banque de Belgique brought suit against the Banque de France then under the Vichy régime for the purpose of recouping gold allegedly taken away from the Banque de Belgique. *Banque de France* v. *Supreme Court of the State of New York*, 287 N.Y. 483, 41 N.E. 65 (1942); *De Gorter* v. *Banque de France*, 176 Misc. 1062, 29 N.Y.S.2d 842 (Sup.Ct., 1941), *aff'd De Gorter v. Banque de France*, 262 App.Div. 997, 30 N.Y.S.2d 815 (1941). A suit for gold brought by an assignee of the Bank of Poland against the Roumanian National Bank resulted likewise in a jurisdictional decision, *Commission for Polish Relief, Inc.* v. *Banca Nationala Rumanici*, 27 N.Y.S.2d 377 (Sup.Ct., 1941).

52. We follow here Dicey's *Conflict of Laws* (5th ed., 1932), Rule 152, and other writers.

53. *Webster's New International Dictionary* (2 ed., 1947) defines "earmark" thus: "To designate or set aside coin or bullion for a specific use. . . . Any gold which is held by any bank, especially by the central bank of one country for the special account of a bank of a foreign country is earmarked."

54. The practice seems to have been elaborated originally in the relations between Federal Reserve Banks. Chambaty, *Die Bank für Internationalen Zahlungsausgleich* (Berne, 1939) 93.

55. No cases or studies have been found dealing with the legal aspects of this kind of "earmarking." See generally Uniform Sales Act § 19(4); Williston, *Sales*, I (2d. ed., 1924) sec. 274 ["appropriation" of unascertained goods passes title

practice employed from 1934 to 1939 by the Bank of International Settlements in Basel, a "bank of central banks". During that period the bank conducted, for the benefit of postal administrations under the Universal Postal Union, accounts of central banks in terms of ounces of fine gold on the basis of actual gold deposited with the bank.[56] The depositing central banks, it seems, became co-owners of the stock deposited, each bank in the ratio of its share to the total weight of the stock. Transfers were made by way of crediting and debiting the gold accounts. However, it may be doubtful how far under the applicable Swiss law these entries did actually transfer shares, or fractions of shares, in the gold stock.[57] Moreover, under the scheme adopted by the bank, the stock in itself fluctuated according to increases and decreases in deposits. The ratio of each share in the whole would fluctuate accordingly. The situation may lead to complex and disturbing mathematical calculations.[58] The whole device has probably lost practical importance since the *in rem* right in gold no longer offers the same security as it did in the past where respect of private property was the almost universally accepted rule.

Central banks, parties in a gold transaction of the type described, are not exempt from the law or the jurisdiction of the *rei sitae* as long as their juristic personality is distinct from that of the state.[59] Foreign governments are exempt and this may be a reason for rendering them the transferees.

in the goods]. For French law see Planiol, *Traité Elémentaire de Droit Civil* (12th ed., by Ripert, 1935), no. 2597(1); for German law, German Civil Code 930 [the foreign government or bank being, in the situation supposed, "intermediate" *(mittelbarer)* possessor within the meaning of the Code 868]. Even where the prerequisites of transfer of title are not fulfilled, a valid contract will ordinarily remain. Among governments or central banks this may be sufficient for practical purposes.

56. Bank of International Settlements, *Annual Reports*, 1938–39, p. 129 and 1939–40, p. 150; Chambaty, *supra*, n. 54, at 105; the writer's "International Monetary Agreements," Am.J.Int.L., 1947, 253.

57. Swiss Civil Code, Art. 717, is in point. There has not been much comment on this provision.

58. This is shown by German experience with similarly constructed joint deposits of securities *(Effecten-Sammel-Depot)*. See B. Ascher, *Die Rechtsgrundlagen des Stückelosen Effectenverkehrs* (1927) and Schumann, "Zur Frage vom Miteigentum beim Sammeldepot" in Klausing - Nipperdey - Nussbaum, *Beiträge zum Wirtschaftsrecht* (1931) 1174.

59. See *Banque de France* v. *Supreme Court of the State of New York* and the other cases cited *supra*, n. 51, and, generally, Harvard Law School, *Research in International Law*, No. III, "Competence of courts in regard to foreign states," (1932) Art. 26, p. 716.

Silver, in the first place, is an industrial tool.[60] Its monetary use, preponderant in former centuries, has become relatively minor. However, in the United States, politics favoring the silver mines industry have inflated the monetary features of the white metal in order to represent the demands of the silver industry in terms of public necessity and especially of monetary administration.

The Silver Purchase Act of June 19, 1934,[61] declares it to be the policy of the United States that the proportion of silver to gold in the monetary stocks of the United States should be increased with the ultimate objective of having one-fourth of the monetary value of such stocks in silver.[62] The resulting pressure upon the government has been greatly enhanced by the formidable subsequent influx of gold into the United States, as the quantity of silver to be purchased rises automatically in proportion to the amount of gold. In the case of acquisitions of silver from natural deposits in the United States their allegedly monetary character has been stressed by a bold juridical device. Those acquisitions have been framed as acceptance by the government for coinage after deduction of a "seigniorage".[63] Under this theory the purchase price has become the "monetary value" of silver,[64] namely, the value of dollars coinable from an ounce ($1.2929), minus the "seigniorage" deducted with the "voluntary consent" of the tenderer. The artificiality of the scheme is evident. The amount of the deduction—originally 50 per cent,[65] now 30 per cent [66]—is much too high for a "seigniorage"; [67] at

60. *Cf.* Baudin, *La Monnaie et la Formation des Prix* (2d ed., 1947) 488.

61. 48 Stat. 1178, § 2, 31 U.S.C. 311a. On the antecedents of this legislation see *infra*, n. 68 and sec. 43 II.

62. In order to prevent speculative forestalling of silver, the President was given power to requisition it, 48 Stat. 1178, § 7, 31 U.S.C. 316a. He did so to some extent by Executive Order No. 6814 of August 9, 1934, revoked by later Orders. 3 Fed.Reg. 998 (1938).

63. Act of May 12, 1933, § 43b(2) ("Thomas Amendment," *infra*, sec. 43 II, as amended, 31 U.S.C. 316a-c; Proclamation No. 2067 of the President of Dec. 21, 1933, 48 Stat. 1723, 31 U.S.C.A. 821 note.

64. The Silver Purchase Act gives the following circumstantial definition: "The term 'monetary value' means a value calculated on the basis of $1 for an amount of silver or gold equal to the amount at the time contained in the standard silver dollar and the gold dollar, respectively." 31 U.S.C. 448b, par. 4.

65. Under Proclamation No. 2067 *supra*, n. 63, the tenderer received 64.64 cents for the ounce of silver. The market price was then about 43.5 cents.

66. The deduction was repeatedly changed: Proclamations No. 2092 [August 9, 1934], No. 2124 [April

67. See Note 67 on next page.

the same time "monetary value", while a proper term for coins, is misleading if applied to bullion, especially where the bullion consists of substandard metal. Juridically, the "seigniorage-monetary value" device militates to make the requisition of silver mandatory upon the Treasury and to exempt the silver transaction at hand from the law of sales.[68] Its main purpose, however, is political—a theoretical concession to free coinage of silver and therefore to the ideology of bimetallism. The result of the procedure was more an increase of silver certificates [69] than of silver coin.

From the viewpoint of actual circulation silver has now become the most conspicuous money metal. Nevertheless, gold has preserved its position of supremacy—only it operates more in the form of ingots rather than of coins and, first of all, simply "in being". During and before World War II outstanding economists predicted the demise of gold as the monetary ruler—the destruction of that alleged monetary "fetish". But they have proved false prophets. It is not our task to plunge into the problem of why the position of gold has apparently been imperturbable, but there is little doubt that tradition and irrational motives are in play just as they were in the creation of money itself.

10, 1935] No. 2125 [April 24, 1935], No. 2268 [Dec. 30, 1937], Act of July 6, 1939, 53 Stat. 998. The deduction was limited to 30 per cent, by the Act of July 31, 1946, 60 Stat. 750, 31 U.S.C. 316d.

67. The amount of the seigniorage had raised doubts of legality within the Government which were found groundless in 37 Op.Att.Gen. 344 (1933). Generally, however, discounts of this size are termed "profits" rather than "seigniorage." *Palgrave's Dictionary of Political Economy* III (1925), "Seigniorage." Prior to the Act of 1946, *supra*, n. 66, the deduction was made allegedly "as seigniorage and for services performed by the Government of the United States relative to the coinage and delivery of silver dollars."

68. Theoretically it might also be concluded from the "seigniorage" doctrine that the deliverer of silver would retain his property right in the silver not absorbed by "seigniorage" and in the dollars coined from it; but the opposite result follows from the text of the regulations which do not compel the Treasury to make the disbursement in dollars coined from the deliverer's silver as the Treasury may give the tenderer silver certificates, 31 U.S.C. 821(b) par. 2. See also 38 Op.Att.Gen. 89 (1934).

Earlier silver purchase Acts had used plain "purchase" language. See Bland-Allison Act of Feb. 20, 1878, 20 Stat. 25, and the Sherman Silver Purchase Act of July 14, 1890, 26 Stat. 289.

69. *Infra*, p. 92.

Section 6

PAPER MONEY

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I. Paper Money and Money Paper

The term paper money (*papier-monnaie, Papiergeld, moneta cartacea,* etc.) is in universal use. It means any note circulating as money. American legislation, it was mentioned, dubbs paper money "currency" [1] but this terminology has not entered general usage, American or other.

French doctrine distinguishes between *monnaie papier,* bank notes—and *papier monnaie*—government fiat money.[2] We have seen that during the nineteenth century the accepted policy was to deny bank notes *legal tender* quality. Here we are confronted with a different though cognate proposition. Bank notes, being merely *monnaie papier,* are denied recognition as *money* altogether. That idea was not exclusively derived from the metallistic dogma which would require the denial of money quality to any circulating note whatsoever. The argument was rather that bank notes were simply promissory notes, hence commercial paper,[3] which draws its circulatory potency from public confi-

1. *Supra,* p. 21.

2. The French doctrine was developed in Courcelle-Seneuil, *Les Opérations de Banque* (1852; here cited from the posthumous eighth edition [1899] 455), and perhaps in earlier writings of the same author, who apparently contrived the spirited juxtaposition of *monnaie-papier* and *papier-monnaie.* The basic idea is much older. It was behind the policy of the home government toward American colonial paper money, *infra,* sec. 40 IV and it was given expression by Huskisson, *The Question Concerning the Depreciation of Our Currency* (1810) 3. Courcelle-Seneuil's theory was entertained by the influential *Traité de Droit Commercial* by Lyon-Caen and Renault (5th ed., 1925), IV, 10.

The first paper money appeared in China during the ninth century. Ramsden, *Chinese Paper Money* (1911) 5. On early Massachusetts paper money, *infra,* sec. 40 IV.

3. A consequence would be that the note in the hands of the issuing bank is no longer a real "banknote" and therefore not money. A thief who had stolen such a note from the bank availed himself of this ingenious argument in order to meet the accusation of having ap-

dence and the solvency of the issuer rather than from the law. Still the fact that bank notes are or were frequently sounder than government fiat paper should have been deemed an additional reason for recognizing, rather than for denying, the monetary character of the notes. Another argument in support of the French theory is to the effect that a bank note evidences a debt and is really a bond, a security. It is true that normally a debt is or was linked to the bank note, but this fact in no way obviates its circulation as money. On the contrary it promotes circulation. The issue was decided in *Bank* v. *Supervisors* where the court regarded United States notes as being both "certificates of indebtedness" and at the same time "currency".[4] The Court held that Congress can exempt United States notes as "certificates of indebtedness" from state taxation, notwithstanding the "currency" feature of the notes.

Underlying the French view was the assumption that bank notes are redeemable. The assumption was never fully warranted. In reality bank notes have often become irredeemable without losing their circulatory function, while government fiat money has sometimes been redeemable.[5] In our day, the diversity between the two types of paper money, if it ever existed, has definitely disappeared. Ironically, the only circulatory paper which

propriated "money." He did not succeed, however. *Regina* v. *West*, 40 *Eng. Law and Equity*, 564 (1857).

4. 7 Wall. (74 U.S.) 26, 19 L.Ed. 60 (1868). Similarly, *Howard Sav. Inst.* v. *City of Newark*, 63 N.J.L. 547 at 549, 44 A. 654 (1899). Disregarding *Bank* v. *Supervisors*, the Court held in *Nortz* v. *United States*, 294 U.S. 317, 326, 55 S.Ct. 428, 79 L.Ed. 907 (1935), that gold certificates, being at that time currency and legal tender, could not simultaneously be "warehouse receipts." Actually, the tobacco notes of Maryland and Virginia served as both, *infra*, sec. 40 IV. Moreover, the gold certificates were not warehouse receipts as for each 100 dollars in gold 120 dollar gold certificates could be issued, Act of March 3, 1863, § 5, 12 Stat. 709, 711, 31 U.S.C. 428. (The significance of this point was overlooked by the Court and the parties). See also Simmonds, "The gold certificate", 44 *Journ. of Pol. Econ.* 534 (1936).

An erroneous theory was also applied by the *Reichsgericht*, Nov. 28, 1921, *R.G.Z.* 103, 231, 235 to the *Darlehenskassenschein*, a special paper money created during World War I. The court pointed out in broad terms that instruments embodying a chose in action were not money; that the *Darlehenskassenscheine*, not being redeemable, "therefore are money proper and nothing but money." However, the Court reversed its theory in a judgment of May 20, 1926, *R.G.Z.* 114, 27, at 29, referring to the writer's *Das Geld* (1925) 29.

5. For instance, the United States notes and Treasury notes, *infra*, pp. 585, 595, n. 6.

has remained freely redeemable is a government note, the American silver certificate.[6]

Despite the weaknesses of what we have called the French theory, the latter has been widely acclaimed within and without France [7] and has influenced the courts.[8] There are few traces of it in Anglo-American law,[9] where the monetary character of bank notes was early recognized.[10] Resistance to the recognition of the monetary nature of circulatory *government* issues [11] has always been confined to writers.

6. *Infra*, p. 92. On the redeemability of Swiss banknotes, *infra*, n. 29.

7 Numerous writers pro and contra are listed by A. Weber, *Die Geldqualität der Banknote* (1900) §§ 15 and 16.

Mater, *Traité Juridique de Monnaie et du Change* (1925) 107, under the influence of the "commodity theory" of money, gives the French doctrine the version that a banknote is a "*promesse, une créance, une chose incorporelle*," and therefore not a commodity and, consequently *(sic)* not money. This puzzling argument has been applauded by Nogaro, "Les principes fondamentaux du droit monétaire," *Revue Trimestrielle de Droit Civil* 1929, 991. A better view is found in *In re Hayes' Estate*, 161 Or. 1, 86 P.2d 424, 87 P.2d 766 (1939) [Federal Reserve notes not "intangibles"].

8. App. Paris, Feb. 8, 1856, *D.P.* 1856 II 184, denied the notes of the Bank of England recognition as money, contrary to the English theory. And the *Reichsgericht*, Oct. 17, 1888, *R.G.Z.* 22, 265, in a dictum, advanced the opinion that bank notes, if levied upon by the sheriff, would not come under the well-known rule according to which "money" seized by the sheriff is delivered to the creditor rather than sold publicly. Even during the great inflation of 1918-1923, App. Hamburg, Feb. 22, 1921, *Hanseatische Rechtszeitschrift* 1922, 86, held that the notes of the German *Reichsbank* circulating within the German colonies were not "money" therein, since the Act making them legal tender had not been extended to the colonies.

9. The United States Code places United States notes and other government paper under the Title (31) on Money and Finance whereas the National Bank notes and notes of the Federal Reserve System are dealt with in the Title (12) on Banks and Banking. And the New York Civil Practice Act § 687 exempted "bills . . . issued by a money corporation to circulate as money" from the rules on levying upon "money," *supra*, n. 8. This was not amended until 1936. See also Justice Story, dissenting, in *Briscoe* v. *Bank of the Commonwealth of Kentucky*, 11 Pet. (36 U.S.) 257, 330, 9 L.Ed. 709, 928 (1837).

10. *Miller* v. *Race*, 1 Burr. 452, 97 Eng.Rep. 398 (K.B. 1758).

11. The *Reichsgericht*, July 11, 1924, *Entscheidungen in Strafsachen* LVIII 255, 256, dealt with a particular kind of paper currency, viz. notes issued, during the inflation, by the German Railway Corporation *(Reichseisenbahn-Gesellschaft)* and circulating in payments. Forging of such notes was considered punishable as counterfeiting of "money".

II. Features of Paper Money—Convertibility and Inconvertibility

Paper money must be so equipped as to render it appropriate to its objective, *viz.*, to be given and received freely with an eye only to its relationship to the ideal unit. Lest the monetary function be destroyed, no other inquiries, computations or tasks must be required of members of the community.

We are concerned here neither with the economic theory of the prerequisites of sound paper money nor with the technical make-up of the notes. Being typical mass issues, they must be uniform, except for individual numbering, and adapted in form to monetary use. Because there can be no "tolerance" for paper money, the legal problems relating to wear and tear are of some importance in point of the creditor's duty to receive legal tender. The inscription on the note must be recognizable. The degree to which the legal tender quality will be impaired by defects in the note depends largely on monetary conditions and habits within the individual country concerned. In 1895, the director of an Italian railway company ordered its employees not to sell tickets for paper money which had been torn and pasted together. The order having been followed, he was fined by the Rome Court of Cassation for violation of the legal tender laws.[12] Since so many notes torn and pasted together, circulated in the country, the Court felt that rejecting them would unduly hamper monetary intercourse and obstruct the use of the railways, and would be disastrous for the non-moneyed class. As a matter of fact, Italian currency was then and later amazingly poor. The rule, therefore, should certainly not be generalized.[13]

In order to simplify the title problem, the instrument, explicitly or tacitly, will be made payable to bearer. It must exhibit on its surface a simple arithmetical relationship to the ideal unit. Paper money does not bear interest,[14] because the necessary computations, varying from day to day and resulting in fractional amounts, would obviate free circulation. During the Civil War, several interest-bearing issues of greenbacks were given legal

12. Judgment of Oct. 12, 1895, *Foro Italiano* 1895 II 500. This is in accord with the rule for coins, *supra*.

13. A one-dollar United States note from the corner of which 1¼ inch had been torn, was held not to be legal tender for railway fare. *North Hudson County Ry.* v. *Anderson*, 61 N.J.L. 248, 39 A. 905 (1897). Regarding Federal Reserve notes unfit for circulation cf. Act of Dec. 23, 1923, § 16, 38 Stat. 266, 12 U.S.C. 413.

14. 31 U.S.C. 401 expressly provides that United States notes shall not bear interest.

tender quality for "their face value, excluding interest",[15] but even this expedient did not enable them to circulate freely. Should the paper embody a chose in action, it must be one which matures on demand, for otherwise the holder would be confronted with a discount problem.

The most important question presented by a money note is that of convertibility. Convertibility is ordinarily synonymous with redeemability: the holder of a redeemable paper money note has the right to receive payment from the issuer of the sum specified therein. In very rare cases convertibility other than through redemption (payment in money) has appeared. The "greenbacks" issued under the statute of February 25, 1862, conferred upon the holder the right to have them exchanged for 6 per cent compound-interest-bearing gold bonds of the government.[16] Similarly the holders of German *Rentenbankscheine* of 1923, successfully used as temporary currency for a time, were entitled to receive interest-bearing gold bonds (*Rentenbriefe,* a kind of unredeemable mortgage bond on agricultural and industrial real estate) in exchange.[17] The "postage currency" inaugurated during the Civil War is another exceptional instance in that the holder enjoyed mailing privileges against the government.[18]

Where the note requires "redemption", notes of the same issuer or of the same type, even though legal tender, are necessarily

15. Joint Resolution of Jan. 17, 1863, 12 Stat. 822; Act of June 30, 1864, § 3, 13 Stat. 218. Cf. *Knox* v. *Lee,* 12 Wall. (79 U.S.) 457 at 646-47, 20 L.Ed. 287 (1870). The German Bank Law of Aug. 30, 1924, *R.G. Bl.* 1924 II 235, §§ 4 and 39, in order to describe the monetary feature, repeatedly employs the phrase "banknotes and other bonds payable to bearer and *not bearing interest.*" See also German Civil Code § 799, *infra,* n. 37.

In 1894 the Attorney General of the United States declared that 4 per cent bonds of $5, $10, and $20, to be issued by a Georgia county and intended to be used as "local currency," did not violate the federal banking laws. He refrained from contemplating the monetary aspects of the case. Because of the smallness of the amounts, interest was almost negligible. The bonds were therefore monetary. 21 Op.Att. Gen. 70 (1894). See also the occurrence discussed *infra,* sec. 41, n. 72.

16. 12 Stat. 345, sec. 3. *Infra,* sec. 42 I.

17. Decree on the Establishment of the German *Rentenbank (Rentenbank-Verordnung)* of October 15, 1923, *R.G.Bl.* 1923 I 963, § 15. See Schacht, *Stabilization of the Mark* (1927) c. 3 and 4; Elster, *Von der Mark zur Reichsmark* (1928); Baumgartner, *Le Rentenmark* (Paris, 1925); K. Mackenzie, *Banking Systems of Great Britain, France, Germany and the U. S.* (2d ed., 1935) 182.

18. Acts of July 17, 1863, 12 Stat. 592, and of March 3, 1863, § 4, 12 Stat. 709 at 711. *Infra,* sec. 42 at n. 7.

excluded as media of redemption. The debt of the issuer is therefore a qualified one. It may be qualified more specifically, as by an express provision of the law requiring redemption in gold.[19] American silver certificates are exclusively redeemable in silver. Gold redemption has practically disappeared everywhere.[20]

Despite the formidable number of noteholders, disputes over their rights have rarely arisen. Under normal conditions little occasion exists for litigation; and in times of emergency, the legal situation of noteholders is precarious. There is a tendency to twist their rights. Thus it was held by the German-Czechoslovakian Mixed Arbitral Tribunal, set up under the Versailles Peace Treaty, that the notes of the *Deutsch-Ostafrikanische Bank,* which operated in the former German colonies, did not give the holder a contractual claim against the bank.[21] The customary promise to pay as printed on the notes, was construed by the Court as a mere undertaking by the bank toward the German Government. Even where the right of the holder is recognized, the court may lack jurisdiction over the issuer. This refers particularly to paper money issued by the government, since jurisdiction of the courts over the state is generally restricted. In a notable Italian case, the court refused for lack of jurisdiction to determine a claim for damages brought against the *Banco di Napoli,* a bank of issue which had dicontinued redemption of its notes. Since the claim related to the monetary power of the sov-

19. This has been done, *e.g.*, in the case of the gold certificates of old, Acts of March 3, 1863, § 5, 12 Stat. 709 at 711, and March 14, 1900, § 6, 31 Stat. 45 at 47, 31 U.S.C. 428, 429, and of the United States notes, Act of March 14, 1900, § 2, 31 Stat. 45, 31 U.S.C. 408. *Infra,* sec. 43 I.

20. It has been abolished in this country by the Gold Reserve Act of Jan. 30, 1934, 48 Stat. 340, § 5, 31 U.S.C. 315b. Regarding Switzerland, cf. *infra,* n. 29.

21. Judgment of February 13, 1925, *Recueil des Décisions des Tribunaux Arbitraux Mixtes* V, 551. The reasoning of the *Reichsgericht,* November 28, 1921, *R.G.Z.* 103, 231 was similar. During the occupation of Poland by the German army in World War I a Polish institute of issue was established with the cooperation of the German authorities, the notes carrying the inscription, "The German Reich undertakes guarantee of the payment of this note in German marks at the face value." The claim brought by a holder against the German government for payment of the face amount was dismissed by the court on the not very convincing ground that the inscription on the notes was only a statement of an obligation incurred by the German government on behalf of the institute of issue. The decision is inconsistent inasmuch as it characterizes the *Reichskassenscheine,* a government paper money, as bearer *bonds* though these notes did not even carry on their face a promise to pay.

ereign, it was regarded by the court as resting on "political grounds" (public law).[22]

Bad as judicial frustrations of the noteholders' rights are, greater danger lurks in legislative or authorized executive action doing away with redemption. Such enactments have all too frequently occurred in emergency situations. Necessity may make it impossible to fulfill such honest intentions and solemn promises, as the declaration of Congress, enacted in 1869, that "the faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest known as United States notes . . ."[23] The giving of such a promise is, in some respects, more reprehensible

22. Court Torino, June 9, 1892, *Il Diritto Commerciale* (1892) 695; see Frauz, *Die Verfassung der Staatlichen Zahlungsmittel Italiens* (1911) 124.

23. Act of March 18, 1869, 16 Stat. 1, 31 U.S.C. 731. This promise was finally carried out in 1879, *infra*, sec. 42 at n. 19. See, however, Bullock, *Monetary History of the United States* (1900) 71: "For a long time [the Continental] Congress . . . had repeatedly pledged the public honor, its sacred honor, and several other kinds of honor, that the currency would certainly be redeemed at its face value." That currency went under unredeemed, *infra*, sec. 41 I. It may also be mentioned that the New York Constitution, Art. VIII, § 5, as amended in 1846 and repealed in 1867, explicity withheld from the legislature the power to suspend specie payment of bank notes. Actually the banks suspended specie payment in 1857 and 1861. Of course, such things were not peculiar to the United States. During the excesses of John Law, Louis XV of France promised to stop the emission of paper money only to forget the promise very soon. Sédillot, *Histoire du Franc* (1939) 115. In 1811 the Prussian *groschen*, a sub-standard coin, was rated down in terms of silver although at a previous rating-down in 1808 the King had solemnly declared that such a measure would "never be repeated." *Novum Corpus Constitutionum Prussico-Brandenburgiensium* II (1822) 342; Decree of Dec. 13, 1811, *Preussische Gesetzsammlung* 1811, 373. Again, in 1813, new Prussian Treasury bills were issued as legal tender, contrary to a promise given in a Royal Decree of 1809. See Sobernheim, "Die Geldentwertung, etc." in *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* LXVI, (1923) 257, 311. The Austrian Government, in 1848, conferred the quality of legal tender upon irredeemable notes, contrary to a promise given in 1816. Savigny, *Obligationenrecht* I (1851) 446. Two Russian instances of such broken pledges (by Catharina II and by Nicolas I (in 1848) are mentioned by Sobernheim, *op. cit.* 304.

There is little doubt in the writer's mind that systematic research into the monetary history of the various countries will produce many more instances. Recently the Soviet Government declared that the sacrifice imposed upon the people by the 1947 devaluation of the ruble will be their "last sacrifice." *New York Times*, Dec. 15, 1947, p. 6.

than its breach, and has been compared, not without adequate reason, to a promise not to become ill.[24]

Termination of redemption is usually called "suspension" or "temporary cessation of payment". There are a few instances where redemption was resumed after a number of years.[25] Ordinarily, however, the "temporary" measure, though perhaps originally decreed only for a brief period [26] will become permanent. In any event, since the outcome of a "suspension" is uncertain, any declaration for the future is merely speculative and without legal significance. As long as legislative "suspension" obtains, it has exactly the same effect in law as a legislative cessation which is not stated to be temporary.[27] To be sure, such declarations of temporary purport are frequently used as justification or as a pretext for preserving the payment-promise clause in the notes, and its incorporation in new sets of issues. It would be more correct, at least after a short "time of mourning", to replace the payment-promise clause with a mere statement of the nominal value of the notes. The latter form is the only correct one for inconvertible paper money. The preservation of the redemption formula in irredeemable paper money [28] must be explained in psychological terms. The government is afraid that a change in the imprint may give rise to repudiations and other disturbances.

Despite the fact that paper money has become practically inconvertible and no longer evidences a debt,[29] such notes must, for

24. Janssen, *Les Conventions Monétaires* (1911) 69.

25. This happened in France in 1850 and 1875, after a suspension of more than two and five years respectively. Sédillot, *supra*, n. 23, at 234, 238, 240, 248, with text of the decrees.

26. The Argentine legislation of 1914 is an example. Schoo, *La Clausula Oro* (1937) 363.

27. *Reichsgericht*, Dec. 18, 1920, *R.G.Z.* 101, 141, in view of the decree of Sept. 28, 1914, *R.G.Bl.* 1914, 417, having the force of law and declaring the gold clauses "for the time being" *(bis auf weiteres)* ineffective. See also *Ottoman Bank of Nicosia* v. *Chakarian*, [1938] A.C. 260 (Pr.C., 1937), regarding Turkish law, and *Auckland Corp.* v. *Alliance Ins. Co.*, [1937] A. C. 587 (Pr. C.), describing how, in the case of English and New Zealand paper money, suspension of redemption became final.

28. Regarding Federal Reserve notes and United States notes, see *infra*, pp. 92, 93.

29. Swiss bank notes are still redeemable in gold, but transactions in gold are placed under so stringent a supervision (including the licensing of exportation) that possession of gold has only a very limited value. Decrees of the Federal Council of Dec. 7, 1942, *Eidgenössische Gesetzsammlung* 1942, 1137, and of the Finance Department of the same date, *ibid.*, 1141. The situation is well illustrated by Federal Tribunal, Jan. 27, 1948, *Praxis des Bundesgerichts* XXXVII 139.

reasons of accounting, appear on the liability side of the balance sheet of the bank or other institution of issue.[30] There should be no misapprehension, however, of the legal nature of the notes. The "debtor" has disappeared.

The foreign holder of paper money will be affected equally with the domestic holder by a suspension or abolition. Paper money is invariably governed by the law of the country of its origin. In a very few cases foreign holders have attempted to sue the bank of issue outside the country of origin, for redemption or damages, but without success.[31]

Provisions requiring the maintenance of specific reserves have in the past been universal for bank notes and not infrequently for government paper money. The reserves are ordinarily composed of gold (or gold certificates), government securities and prime commercial paper; minimum percentages relative to circulating notes are defined by the law. The monetary and banking laws of the various countries differ in this respect.

The provisions regarding note reserves are ordinarily not generators of private rights in the note holder. They are enforced by the government whose business it is to supervise the administration of the reserves. Rarely were the holders given a lien on reserves [32] and, if so, its value was questionable.

30. Should a central note institution under an inconvertibility regime be liquidated, the legislature would have to provide for the protection of the noteholders, and this would probably be done by replacing the notes with those of a newly authorized issuer. But it is unlikely that enforceable claims of holders would exist, and certainly claims for payment in coin would not. Realization of the assets of the bank would be impossible, since such assets, in the situation supposed, would usually consist mostly of government debts. In no event would contemplation of the highly hypothetical case of the bank's liquidation justify the assumption that a real "debt" underlies the irredeemable note. The question was touched upon in the Portuguese Bank Note case. See *infra*, p. 84, and Kisch, *The Portuguese Bank Note Case* (1932) 184.

31. App. Milan, Feb. 18, 1938, *Foro Italiano* 1938 I 575, and Court Arnhem Nov. 12, 1936, *Nederlandsche Jurisprudentie* 1937, 332, both concerned with notes of the German *Reichsbank*. See also *Reichsgericht*, Sept. 19, 1923, *R.G.Z.* 107, 121, regarding the unredeemability of the notes of the *Deutsch-Ostafrikanische Bank* in Daressalam.

32. This occurred in Italy; Royal Decree of April 28, 1910, No. 204, *Raccolta Ufficiale* 1910 I 753, Art. 15 and 16; Royal Decree of Dec. 21, 1927, n. 2325, *ibid.*, 1927 IV 4869 [tr. Federal Reserve Bulletin 1942, 642]. See Greco, *Corso del Diritto Bancario* (2d ed., 1936) 159. Regarding the lien of Federal Reserve notes on all assets of the bank, *infra*, n. 71.

Whatever the rights of the holder, there is no collective protection such as modern law has elaborated in favor of security holders. Lord Mansfield's doctrine contrasting bank notes and securities has been resurrected in novel form. Neither the *Securities Act* of 1933,[33] nor the *Securities Exchange Act* of 1934 [34] are available to vindicate the claims of injured holders of paper money nor does the legal organization of bondholders, as provided by foreign laws [35] cover their rights. The aim of those laws is to safeguard investments.

As regards the relation between the giver and receiver of paper money, there need be just as little privity between them as in coin transactions. The majority of American courts well understood the exigencies of monetary intercourse, when they decided that the innocent transferor of a bank note does not warrant the solvency of the bank, even though the bank was insolvent at the time of the transfer.[36] This question is now, indeed, no longer important.

III. Loss, Theft and Mutilation of Paper Money

The peculiar money character is embodied in paper money exactly as in coin. If paper money is lost or destroyed, the owner

33. Paper moneys of the United States, even if considered to be securities, would not fall under the Securities Act of 1933, 48 Stat. 74 at 75, 15 U.S.C. 77c, according to par. 3(a) (2), exempting securities issued by the United States or by any person controlled or supervised by and acting as an instrumentality of the government of the United States.

34. § 3(10) of the Securities Exchange Act of 1934, 48 Stat. 881, 882, 15 U.S.C. 78(c): "The term *security* . . . shall not include currency. . . ."

35. A German law of Dec. 4, 1899, *R.G.Bl.* 1899, 691, provides for a bondholders' meeting as an agency for vindicating the common rights of the bondholders and granting time to a financially embarrassed issuer. It is generally believed that this statute does not apply to banknotes. James Breit, *Das Bankgesetz* (1911) 63. On similar laws of other countries, see Domke, "Vers un nouvel effort de la protection internationale des obligataires," *Nouvelle Revue de Droit International Privé* (1936) 22; Kreher, *La Défense des Obligataires* (1938).

36. Authorities are listed in Daniel, *A Treatise on the Law of Negotiable Instruments* III, (7th ed. 1933) sec. 2025. He supports the view stated. *Bayard* v. *Shunk*, 1 Watts. & S. (Pa.) 92 (1841), and *Lowrey* v. *Murrell*, 2 Port. (Ala.) 280 (1835), are outstanding. Among the contrary cases is *Fogg* v. *Sawyer*, 9 N. H. 365 (1838), sometimes erroneously cited as a leading authority. Ital. Cass., March 7, 1924, *R.D. Comm.* 1924 II 364, held that the transferor, by putting his name on the banknote, did not assume a special liability as to genuineness or validity toward the transferee beyond the one existing under the law with regard as to genuineness, English courts have placed the risk upon the transferor. Daniel, at sec. 2029.

has no remedy against the issuer. The difference between paper money and a bond warrant can perhaps more easily be seen from the vantage point of continental laws for the protection of the owners of bearer warrants lost by theft, destruction or otherwise. Such protection is afforded through special proceedings in which, after public notice of loss and upon the expiration of a certain period thereafter, the issuer is forbidden to pay the unlawful holder of the lost instrument, which is then invalidated and replaced by a substitute instrument delivered by the issuer to the applicant. Extension of these provisions to paper money notes, even when they are in the nature of bearer warrants, would obviously weaken the confidence in circulating notes and so impair the normal functioning of the entire monetary system. For these reasons bank notes and other paper money are invariably exempt from the operation of such laws.[37]

Anglo-American law affords no such remedy to the owner of bearer warrants, and, for that reason, makes no special provision by way of exception for paper money. Since, just as in civil law, *bona fide* holders of money stand in an even stronger position than holders of negotiable instruments,[38] the risk to the owner of paper money is likewise greater. It will not matter to him whether he loses coin or paper money. Where bank notes are destroyed by fire, some older cases hold that the bank remains obligated to pay the last owner provided he produces sufficient evidence of the total destruction of the notes, and posts a bond to indemnify the bank should the allegedly destroyed notes turn up.[39] Consequently, he would be entitled to the lesser right of receiving a substitute bank note for the same amount instead of redemption. The lesser remedy would, in fact, be the only remedy if the note was inconvertible. The rule, however, was laid down a century ago in very cautious language with an eye to state bank notes. It was then not beyond a bank's powers to scrutinize incoming notes. The situation is far different with a modern national paper money, such as Federal Reserve notes, United States notes, notes of the Bank of England, *etc.* It is unlikely that courts

37. German Civil Code 799 (excluding from public summons and judicial cancellation "bonds on bearer, payable on demand and not bearing interest"; French *Loi relative aux titres au porteur*, June 15–July 5, 1872, § 16, *D.P.* 1872 IV 112; Italian regulation of Oct. 30, 1896, n. 508, *Raccolta Ufficiale* 1896 III 3490.

38. *Infra*, p. 95.

39. *Wade* v. *New Orleans Canal & Banking Co.*, 8 Rob. (La.) 140 (1844); *cf. Hinsdale* v. *The Bank of Orange*, 6 Wend. (N.Y.) 378 (1831). On worn or mutilated National Bank notes see Act of June 23, 1874, § 1, 18 Stat. 206, 12 U.S.C. 124.

will extend the rule to such types of paper money. If the note is destroyed, it would seem to be as much gone as a destroyed coin.[40]

On the other hand, while it is physically intact, each note is just as good as any other note of the same issue. Because of their monetary character, no discrimination among them is permissible. For this reason the statute of limitations does not run against rights upon the paper, nor are such rights extinguished by redemption; the notes may be lawfully reissued again and again[41] (though there might be administrative restrictions on this score). Paper money lost or stolen from the issuer or fraudulently or surreptitiously put into circulation will confer upon the *bona fide* holder all the rights ordinarily connected with owner-

40. An early nineteenth century commercial practice was the severance of bank notes to insure protection against failure of delivery through the mails. The legal effect of such severance was destruction of the negotiability of either half because it might eventually come into the hands of different *bona fide* holders. Story, *Promissory Notes* (7th ed., 1878) sec. 111; *Mayor* v. *Johnson*, 3 Campbell 324, 170 Eng. Rep. 1398 [K.B., 1813]. American courts have held the joined halves negotiable. *Union Bank* v. *Warren*, 4 Sneed (Tenn.) 167 at 170 (1856); *Patton* v. *State Bank*, 2 Nott & McCord (S.C.) 464 (1820); *Martin* v. *Bank of U. S.*, 4 Wash. Cir. Rep. 253, Fed. Cas. No. 9,156 (C.C.E.D.N.Y., 1821); *Bank of the U. S.* v. *Sill*, 5 Conn. 106 (1824); *Farmers' Bank* v. *Reynolds*, 4 Rand (Va.) 186 (1826); *Hinsdale* v. *Bank of Orange*, 6 Wend. (N.Y.) 378 (1831). The First Bank of the United States issued "half notes" or "duplicates", payment to be made on presentation of both halves or guarantee of destruction of the other half. Holdsworth & Dewey, "The First and Second Banks of the U. S.", *(Publications of the National Monetary Commission*, 1911) 50. Protection from possible injury as a consequence of the rules mentioned was accomplished by stringent rules of evidence in connection with proof of loss, theft or destruction and by the imposition of severe penal sanctions (*e.g.* of forgery) for the joining of portions of instruments with intention to defraud. 35 Stat. 1088 at 1119, § 162 (1909), 18 U.S.C. 276; N. Y. Penal Law, § 880; Pa. Stat. Ann. (Purdon, 1936) Tit. 18, § 3613; Ill. Rev. Stat. (Cahill, 1935), c. 38, § 264. The practice of halving the banknotes existed also in France. Cf. Sigogne, *supra*, p. 63, n. 24, at 49, and Trib. Comm. Seine, May 23, 1870, *D.P.* 1870 III 78.

The German Banking Law of August 30, 1924, *R.G.Bl.* 1924 II 235, § 32, par. 1, placed the *Reichsbank* under a duty to deliver a substitute note for a part of a note, provided the part was larger than the half or it was proven by the holder that the missing part had been destroyed. The bank was allowed to deduct its expenses for investigation. § 32, par. 2, added that the bank was not obligated to deliver a substitute for notes destroyed or lost.

41. See Morse, *Treatise on the Law of Banks and Banking*, II (6th ed., 1928), sec. 643; Daniel, *supra*, n. 36, at III, sec. 2004; Hart, *The Law of Banking* (4th ed., 1931) sec. 568(e) [no new tax on reissue].

ship of the paper.[42] And when paper money has depreciated, the holder cannot be allowed "revaluation".[43]

IV. The Portuguese Bank Note Case

The basic problem of paper money, inconvertibility, was illuminated in a tragi-comic way by the famous English case of *Banco de Portugal* v. *Waterlow & Sons, Ltd.*[44]

Early in 1925, a swindling ring, by an incredibly ingenious manoeuvre, induced the reputable printing firm of Waterlow & Co. of London, official printers of the notes of the *Banco de Portugal,* to run off on the plates of the bank 200,000 notes of 500 *escudor each,* carrying the picture of Vasco da Gama, and to deliver the notes to the ring. In the course of the year another 280,000 notes followed. With the criminal assistance of the Portuguese envoy at the Hague the plotters had succeeded in convincing the unusually gullible head of Waterlow & Sons that they acted by authority of the Portuguese government. They also asserted, and he believed, that the notes, after later addition of a special imprint were to be used for increase of the currency of the Portuguese colony of Angola. That is why, as Mr. Waterlow fully understood, the *Banco de Portugal,* the only Portuguese bank of issue, had to be kept uninformed of this extraordinary transaction. The gold parity of the *escudo,* the Portuguese monetary unit, had originally been four shillings five and one-quarter pence. At the time of the crime it had depreciated to about two and one-half pence, the notes of the *Banco de Portugal,* having been inconvertible since 1891. 500 *escudos* were therefore equivalent to about five pounds sterling (gold). Through a bank established by them in Portugal, the swindlers, by the end of 1925, had circulated more than 200,000 of the notes, amounting to about 100 million *escudos.* The crime was discovered, in December, 1925, under dramatic circumstances. The *Banco de Portugal,* in

42. See Daniel, *op. cit.,* III, sec. 2000. As for notes fraudulently and surreptitiously put into circulation, see *Cooke* v. *U. S.,* 91 U. S. 389, 23 L.Ed. 237 (1875). Notes issued by the Comptroller of the Currency to national banks for circulation were to be redeemed by the bank even though the signature of the bank official was missing or forged. 27 Stat. 322, 12 U.S.C. 125. This cannot be generalized, but the principle underlying the statute supports the rule set forth in the text. *U. S.* v. *Barnard,* 72 F.Supp. 531 (W.D. Tenn., 1947), does not indicate a different view because there the coin was sold as a collection specimen. Regarding the ineffectiveness of private marks on paper money, see *infra.*

43. *Infra,* sec. 14 III.

44. [1932] A.C. 452 (H. of L.). On the criminological aspects of the case, Rhodes, *The Craft of Forgery* (1934) 173.

order to avert a monetary catastrophe, decided, not only to exchange the spurious notes issued by the swindlers, but also to call in the whole Vasco da Gama series and replace it with a new issue. The exchange of the spurious notes was facilitated by the fact that the bank was authorized to emit notes up to 195 million for its commercial business, and at the time of discovery had actually issued only 64 million. This left a balance more than sufficient for carrying through the exchange. The *Banco de Portugal* sued Waterlow & Co. for damages suffered as a result of the printer's breach of contract and negligence. The bank claimed the full exchange value of the unauthorized 500 *escudo* notes turned in (£1,092,281) plus the printing cost of the genuine notes given in exchange (£6,541), deducting, however, an amount of £488,430 realized from the compulsory liquidation of the swindlers' bank. The House of Lords by a 3 to 2 decision allowed the claim. The majority of the Court of Appeal had granted half the claim, Scrutton, L. J., voting for its entire dismissal.[45] Each judge of both Courts gave a separate opinion. An entire volume on the case was published in 1932 by Sir Cecil H. Kisch under the title "The Portuguese Bank Note Case", which, while treating the case primarily from a financial angle, offers as well much data of legal value.[46]

Despite the abundant discussion in the hearings, in the opinions, and by Kisch, the case offers a wealth of unexplored material on the peculiar nature of inconvertible paper money.[47] The decision of the House of Lords was based essentially on the argument that the bank, in exchanging its genuine for spurious notes, had suffered a loss measured by the value which the notes would in the normal course of events, have realized. This in the opinion of the Court was the full exchange value of the notes. The minority relied on the argument that the notes, in the hands of the bank, had no value over and above the printing cost which would obviously have been the only loss suffered had the notes been burned in the bank's vaults. The exchange of the genuine for the spurious notes did not add to the bank's burden if the inconvertibility of the notes were taken into account.

As a matter of fact, there is an important difference between notes in the hands of the bank of issue and notes in circulation.

45. 100 L.J. (K.B.) 465 (C.A., 1931).

46. See also Hollond "The Portuguese Bank Note Case," 5 *Cambridge Law Journal* 91 (1935).

47. A unique feature is the fact that the inflationary injection was made into a perfectly anaesthetic patient. No experiment even of highest ingenuity could reproduce such a situation.

The latter may be used by the holder at his whim, which is not the case with notes held by the bank. A bank of issue, particularly a central note institution like the *Banco de Portugal,* is both by law and the exigencies of currency protection strictly confined to certain types of transactions, principally discounting (or rather rediscounting) of bills of exchange and commercial paper. The law of Portugal provides much as do the laws of other countries that the bank's discount and loan operations must be effected for a period not exceeding three months; bonds or commercial papers which are discounted should as a rule carry the signatures of three, never less than two, firms of established credit and recognized solvency, *etc.*[48] Opportunities for such discounting will depend on the changing business conditions of the country. The bank is, on principle, unable to create the conditions of the note issuance by its own action. (The qualifications of this proposition are irrelevant for the purposes of this discussion.) Hence, the inconvertible note in the hands of the bank has a potential value which is far below that of a circulating note and difficult to formulate in exact figures. We are then faced with a sort of economic miracle: the value of the note is entirely metamorphosed by the issuance process. The two values are not equal nor does a definite ratio pertain between them. Hence when the bank issues a genuine note for a forged one, the gain of the recipient is not the same as the loss to the bank. Nevertheless the bank is damaged, since it has reduced its future permissible issue.

In the Portuguese Bank Note case there was neither allegation of, nor inquiry into, the amount of loss suffered in terms of this or a similar analysis. A scrutiny of the transactions of the swindlers' bank would perhaps have permitted a rough estimate of the rediscounting profit lost by the Bank of Portugal because of the reasonable credit demands satisfied by the swindlers' bank which had circulated spurious notes up to six per cent of the entire Portuguese currency.[49] In no event, however, could the loss of the bank have equalled the face value of the notes. Had the bank used the two hundred thousand 500-escudo notes for discounting rather than for exchange purposes, the discounted commercial paper would not have become a definitive asset of the bank in a financial sense; it would rather have been security for the repayment of loans made by the bank. The borrower would have delivered to the bank, in discharge of his obligation, notes subject to the issuance restrictions mentioned.

48. See Kisch, *op. cit.*, at 155.

49. The total note circulation in Portugal was, in 1925, about 1700 million *escudos.* See [1932] A.C. 452 at 465.

No profit other than discounts could accrue to the bank, and nothing could lawfully be claimed by the bank as damages except loss of such discounts and the cost of printing new notes.

Sir Cecil Kisch, viewing the matter from the economist's angle, also feels that the bank did not suffer the loss claimed. He stresses the fact that the bank had done nothing to eliminate the fraudulent inflation, to do which would indeed have required expenditure of its own funds. It had acquiesced in the inflation. Not even the yield arising from the liquidation of the swindlers' bank was withdrawn from circulation; it was appropriated by the government in return for Treasury bills.[50] Moreover, cooperating with the government, the bank proceeded to a further expansion of the paper currency. A government decree of July 19, 1926, authorized the bank to raise its note circulation (1) by 100 million *escudos* in lieu of the amount consumed through the exchange of the spurious notes, (2) by another 100 million *escudos* to be issued on a commercial basis, and (3) by an additional 125 million to be advanced to the government for purposes of colonial development.[51] Through the use of these powers, the quotations of the English pound in terms of the *escudo* rose about 13.7 per cent from 95 in December, 1925, to 108 in 1928. The factual stabilization at the latter point was made a legal one in 1931, but did not last long.[52] In the opinion of Kisch, the policy described resulted in very great profits to the bank, and he concludes his book, somewhat sardonically, with "congratulation to the bank on the results achieved."

From a legal viewpoint, it is certain that if the bank had incurred real expenses in order to soak up the inflationary issue, it would have been entitled to recovery. But this is an academic question. On the other hand, the decree of the government restoring the impaired power of the bank constituted the independent act of a third person and, therefore, could not have been relied upon by the defendant, particularly as the Portuguese government had taken the precaution, in granting the substitute issuing power, to reserve all rights against the defendant. The other measures of the government and the bank are less relevant. Kisch seems to assume that the "success" of the illicit inflation moved the Portuguese authorities to indulge in an inflationary policy thereby offseting the bank's loss. This is mere conjecture. There is no reason for assuming a connection be-

50. See Kisch at 238.

51. *Id.* at 170, 192, 230.

52. The Portuguese currency very soon became implicated in the crisis of the English pound. Kisch, at 280.

tween the alleged financial outcome of the bank's monetary policy up to 1928 or even 1931 and the Portuguese Bank Note case. Success or failure of such a course of conduct depends to a great extent on the general business conditions of the country. On the whole, 1925 to 1928 were boom years. Hence Kisch has shown no legal point militating against the decision of the House of Lords.

Nevertheless, his discussion is highly instructive.[53] It discloses the interpenetration of bank and government which is the inevitable result under a regime of inconvertibility. For instance, the Portuguese government paid the bank so-called interest of 1 per cent on its debts which amounted to more than 90 per cent of the entire note issue; five-eighths of the interest was devoted to an amortization fund while three-eighths covered the bank's own cost in issuing the notes.[54] Practically, this meant no redemption and no interest. Yet the debt was, to its full extent, a basis of note issue. Increase or decrease of the debt had little actual significance except for possible repercussions on note circulation. A shift to the government of the amount recovered by the bank from Waterlow & Co.[55] would have required a ledger

53. The discussion of the case by R. G. Hawtrey, the well-known author on money and credit, in 52 *Economic Journal* 391 (1932), is less helpful. He believes the adjudication of the case to be correct. He sees only one possible objection to the decision, namely, that the decree of 1926 had added 100 million *escudos* to the commercial issue, thus seemingly compensating the bank for its loss. Hawtrey points out that even this objection fails because it is a mistake to suppose that a bank of issue necessarily *can* recoup itself for its losses by increasing the issue. This may or may not be so, but the real objections are not seen by Hawtrey. Incidentally, expansion of the issue will ordinarily enhance the bank's profit chances and thus will in some measure offset its loss.

54. *Id.*, at 165, 207.

55. This was obviously what happened. Under the decree of July 19, 1926, the bank could not keep the pounds received without using them for a contraction of the currency. This the bank did not do. Kisch, 230, 238. The Government, having compensated the bank by the expansion of the issuance power for the injury suffered, had been subrogated to the bank's rights to the yield of the lawsuit. Hence the Government obtained the pounds sterling just as it had appropriated the yield out of the liquidation of the swindlers' bank. It would have been clear from the beginning that the Government was the real party in interest, had the Government after the discovery of the crime, expressly guaranteed the bank. This a letter of the Government to the bank ostensibly declined to do. But, according to a record of the bank's board of directors (Kisch, 232), "the governor [of the bank] said that as representative of the State, this [namely, declining the guaranty] was not precisely the

operation without actual transfer of equivalent assets from the government to the bank.

In any case, the lawsuit came as an extraordinary stroke of business for the bank and the affiliated Portuguese government. The financial gain was enhanced by the English rules as to foreign currency debts. Assuming it to be true that, as a result of the crime, the bank had foregone a profit of about 90 million *escudos,* the fact remains that it would have been unable to convert this sum into English pounds at the rate applied by the court, since selling such large amount of *escudos* would have depressed their price. However, under the English rule, which holds the time of the wrongdoing determinative of the rate of conversion,[56] the bank collected the equivalent, in pounds, of the *escudos* at the rate prevailing at the date of the wrongdoing; it thus also achieved—and this is a remarkable aspect of the English rule—a gratuitous protection of the sum awarded against the depreciation of the *escudo,* a depreciation effectuated by the bank itself.

One cannot help concluding that the reasons advanced by the members of the highest English court were not very convincing. The court did not clearly appreciate the core of the controversy, that is, the restrictions laid upon a central note institute in the use of its notes, with their corollaries regarding the valuation problem. The question whether the loss in discounts was not the limit of the bank's damage was not even touched upon. This criticism applies, although in somewhat lesser degree, to the opinions of the dissenting judges. There is still another side to the case. A foreign bank had brought a suit against an honest and reputable English firm for an amount sufficient to break a firm of the highest financial standing. The merits of the foreign bank's case were by no means clear. England's highest authority on commercial law, Lord Justice Scrutton, had decided against it. Nevertheless, the majority of the House of Lords turned the scale in its favor. This is a splendid example of impartiality. As such, it is perhaps even more gratifying than a judgment which is only juridically accurate.

V. American Paper Money

Paper money is fully under the control of the Federal government. The Constitution, Art. I, sec. 10, par. 1, expressly forbids the States to issue "bills of credit," that is, notes of a monetary

opinion of the State and he, the governor, was in agreement with the government." The record is perhaps more surprising than the fact recorded.

56. *Infra,* sec. 25 II.

character.[57] Courts have been lenient in the interpretation of this provision. In the Jacksonian period monetary notes emitted by so-called State banks which were virtually departments of state governments, were held constitutional.[58] Later decisions of the Supreme Court validated other kinds of what were really monetary notes of some Southern States, the court not being able to find sufficient evidence in the *official records* that circulation as money was intended.[59] Without that evidentiary self-restriction, the court would most probably have reached a different result, since the evasion was rather patent. However, the court apparently did not wish to rid the States of their obligations by declaring the notes null and void. More recently States have issued circulatory sales tax tokens, ordinarily in fractions of a cent. This is a borderline situation, but the preferable view would be to treat the tokens as bills of credit [60] at least where they actually circulate within the community and must be expected to do so.

Issuance of monetary notes by individuals or juristic persons without authorization on the part of the Federal Government is barred by a dual "death tax" of 10%—one laid upon the issuance of notes used for circulation and paid out by them; [61] and the

57. See *infra*, sec. 41 II.

58. *Briscoe* v. *Bank of the Commonwealth of Kentucky*, 11 Pet. (36 U. S.) 257, 9 L.Ed. 709, 928 (1837), *infra*, sec. 41 V.

59. *Virginia Coupon Cases, Poindexter* v. *Greenhow*, 114 U. S. 270, 5 S.Ct. 903, 962, 29 L.Ed. 185, 207 (1884) [negotiable coupons of Virginia State bonds, receivables in payment of taxes and other dues of the State]; *Houston & Texas C. R. Co. v. State of Texas*, 177 U.S. 66, 20 S.Ct. 545, 44 L.Ed. 673 (1900) [negotiable "warrants" of the State of Texas of $1 and $5, facile for circulation through size, color, and shape, and receivable by the State Treasurer]. See also the Georgia "bonds" *supra*, n. 15.

60. The contrary view was taken in *Morrow* v. *Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935).

61. Act of March 3, 1865, § 6, 13 Stat. 469 at 484, as amended by Act of Feb. 8, 1875, § 19, 18 Stat. 307 at 311; 12 U.S.C. 562. Reissuance entails another 10 per cent tax. *United States* v. *Warwick*, 25 F. 138 (C.C.N.J., 1885). The exemption for issues not exceeding 5 per cent of the issuer's capital refers to the general note circulation tax as provided by Act of June 3, 1864, § 41, 13 Stat. 99 at 111, 12 U.S.C. 541, see 14 Op. Att. Gen. 98 (1872), *cf. Merchants' Nat. Bank of Baltimore* v. *U. S.*, 214 U.S. 33, 29 S.Ct. 593, 53 L.Ed. 899 (1908); it has been misplaced in the U. S. Code. Notes issued by shopkeepers receivable by them in payment of their sales are, though circulating, not subject to the tax. *Hollister* v. *Zion's Co-operative Mercantile Inst.*, 111 U. S. 62, 4 S.Ct. 236, 28 L.Ed. 332 (1884); *U. S.* v. *Warwick*, *supra*. The issuance of money-like obligations of less than $1 is unlawful, Act of July 17, 1862, § 2, 12 Stat. 592, 18 U.S.C. 293, subject to the exemption indicated in the *Hollister* case; *U. S.* v. *Van Auken*, 96 U.S. 366, 24 L.Ed. 852 (1878).

second and more important, laid upon the use and the paying out of circulatory notes of other issuers.[62] The taxes proved sufficient to insure the suppression of notes issued by banks under State charters [63] and by foreign banks.[64] Emission of monetary notes by municipalities falls under the "death taxes".[65] Diverse circulatory "scrip" of municipal governments, especially in the form of "tax anticipation notes" [66] have emerged in the interwar period, but their legality seems not to have been questioned. The establishment and the operation of banks of issue have also been restricted by State constitutions and by other State enactments of the pre-Civil War period.[67]

At present the regular paper money circulating in the United States consists of Federal Reserve notes, silver certificates and United States notes.[68]

The Federal Reserve notes, despite their name, are obligations of the Federal Government.[69] Each bank circulates its own notes bearing the bank's imprint, but the bank is not considered the issuer. Rather the notes are at the discretion of the Board of Governors of the Federal Reserve System issued *to* the bank through the local Federal Reserve Agent on the order of the Comptroller of the Currency, a government official who is in

Regarding the constitutionality of the "death tax", see *infra*, sec. 42 I.

62. Act of Feb. 8, 1875, § 19, 18 Stat. 307 at 311, 12 U.S.C. 563.

63. *Infra*, sec. 42 I.

64. 20 Op. Att. Gen. 534 (1893).

65. *National Bank* v. *U. S.*, 101 U. S. 1, 25 L.Ed. 979 (1879).

66. Such notes—to be redeemed from later tax receipts—were issued in the late thirties by some New Jersey cities. They carried the inscription: "United States of America, State of New Jersey. City of . . ." These phrases pose as geographical data but may give rise to the impression of a liability or responsibility of the federal and State governments. By *N. J. Rev. Stat.* (1937) 40:2-56ff., the State of New Jersey had authorized municipalities and counties to borrow by tax anticipation notes and scrip against their prospective tax receipts for the following year. Such a law, of course, cannot be understood to authorize the issuance of moneylike notes, not bearing interest and physically resembling regular dollar notes. Persons paying out such notes might be liable to the ten per cent tax, *supra*, n. 62.

67. See, e.g., *The State of Oregon* v. *The Hibernian Savings and Loan Association*, 8 Or. 396 (1880), and generally, W. G. Sumner, *A History of Banking in the United States* (1896) 416 et seq.

68. The historical types of American currency are discussed *infra*, sec. 43. They include some types remains of which occur in the present circulation (Federal Reserve Bank notes, Treasury notes).

69. Federal Reserve Act of Dec. 23, 1913, 38 Stat. 251, 265, § 16, 12 U. S.C. 411.

charge of the printing of the notes.[70] The notes constitute a first and paramount lien on all assets of the bank [71] so the latter, too, is legally bound to the holders. The bank has to keep a reserve of 25 per cent of its notes in gold certificates. The certificates, however, changed their character entirely in 1934. They are no longer currency, that is, money in actual circulation; [72] they are exclusively employed as reserve by the Federal Reserve banks. Nor do they any longer embody a claim for gold. It is left to the discretion of the Secretary of the Treasury to what extent he will "redeem" the certificates for the protection of the currency.[73] Practically this redemption means release of gold for shipment abroad. For the amount not covered by the 25 per cent gold reserve the bank has to give collateral security consisting of eligible commercial paper or—with the consent of the Board of Governors—direct obligations of the United States.[74] Such "collaterals" are pledged to the Federal Reserve Agent, whereas "reserves" are not so pledged. The notes still bear the inscription,—(The Federal Reserve Bank X) "will pay Five Dollars to the Bearer on Demand",—though redemption in gold is prohibited by law.[75] Like all the other moneys of the United States, the Federal Reserve notes are unlimited legal tender.

Silver certificates, equally legal tender, are to their full extent backed by silver held in trust by the Treasury.[76] They are redeemable in silver, but this remnant of redeemability is a mockery since the metal value of the silver dollar is still considerably below a dollar. Moreover, the Treasury has seen fit to employ on the certificates the phrase "One Dollar Payable in Silver to the Bearer on Demand", thereby allowing redemption in subsid-

70. Federal Reserve Act, § 16, 12 U. S.C. 418.

71. Federal Reserve Act, § 16, 12 U. S.C. 414.

72. A small amount of the old type gold certificates is still extant. Those outside the United States at the time of the several requisitions were not affected by the requisitioning decrees until they had been imported into this country. Moreover, unlike gold, gold certificates requisitioned but not delivered are not forfeited. The holder is, in any case, entitled to the face amount of dollars.

73. Gold Reserve Act of Jan. 30, 1934, § 6, 48 Stat. 340, 31 U.S.C. 408a.

74. Federal Reserve Act, § 16, 12 U. S.C. 412.

75. *Supra*, n. 20. Besides, the notes repeat the—actually superseded—text of 31 U.S.C. 411 to the effect that the notes "shall be redeemed in lawful money at demand." Redemption, in the Treasury's choice, would be in silver certificates or United States notes. That "redemption" would not make sense.

76. Act of February 28, 1878, § 5, 20 Stat. 25 at 26, as amended, 31 U.S. C. 146, 405, 405a, 821(b) (2), par. 2–4.

iary silver coins whereas originally these notes as expressly required by the Silver Purchase Act had promised redemption in silver dollars.[77] The change, which has never been explained, reduces by more than six per cent the value of the silver collectible by the bearer. Actually, the silver certificates have become the commonest type of American paper money.[78] It is remarkable that the silver interests should have been able to impress, as it were, a silvered surface upon the American monetary system which in reality, as far as metal goes, is based on the tremendous gold holdings of the Government.

A relatively small part of the monetary circulation consists of United States notes (greenbacks). Their preservation is due to an antiquated provision of an inflationary law of 1878 which forbade their retirement.[79] They are no longer redeemable, though in their text, just as in that of the Federal Reserve notes, payment is still promised.[80] They have been legal tender from the outset.

Section 7

SPECIFIC MONEY—TRANSFER AND LITIGATION

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I. Tracing Specific Money

The individual money piece, coin or note, is a tangible thing, a *res corporalis*. In common law it is subject, as a "chattel" to the rules on "personal property"; in civil law, to the rules on "movable things".[1] The applicable norms vary widely in modern le-

77. 48 Stat. 1178, § 3, 31 U.S.C. 405a.

78. To some extent the Secretary of the Treasury has been obligated by statute to place silver certificates in circulation. Act of June 19, 1934, § 5, 48 Stat. 1178, 31 U.S.C. 405a.

79. Act of May 31, 1878, 20 Stat. 87, 31 U.S.C. 404. When the statute was enacted, $345,681,016 of the notes were outstanding. 31 U.S.C. 404 note.

80. The Gold Standard Act of March 14, 1900, § 2, as amended—31 U.S.C. 408—requires the Treasury to hold $150,000,000 in gold as a reserve against United States notes for redemption purposes. The provision has become meaningless through the discontinuance of redemption, but the reserve is still maintained by the Treasury. $317,000,000 of United States notes were in circulation on August 31, 1949.

1. The discussion of this subject in Schouler, *Personal Property* (5th ed., 1918) 502, and in 18 *Ruling Case Law* 1268 (1917) is not satisfactory.

gal systems, primarily because the Roman law, still followed in the Central European systems,[2] makes passage of title in movables dependent on transfer of possession. However, this and other differences have little importance in the monetary field.[3] With respect to the really significant points we find a marked degree of uniformity in the various legal systems.

Because in monetary intercourse the recipient of money is chiefly concerned with its numerical relationship to the ideal unit, it is imperative that he be spared the necessity of inquiring into the title of the person who gives him the money. In line with this, Roman law, while not going the length of protecting *bona fides*, made the transferee the owner of the money when through commingling with other money identification had become impossible.[4] This rule operated especially where the money did not belong to the transferor. Of course the former owner might maintain a claim for damages in tort or contract. While the commingling of wine, grain and other fungibles resulted in proportionate coownership of the whole mass, the commingler of money became the exclusive owner, a difference which despite strong objection by German writers,[5] is entirely justifiable in point of monetary policy. Modern law reaches the desirable result by protecting the *bona fide* holder of money, regardless of the transferor's title. The French Civil Code and its derivatives, however, lean on Roman tradition by requiring both *bona fides* and "consumption"

The same is true of Kaser, "Das Geld im Sachenrecht," *Archiv für Civilistische Praxis* XLIII (1936) 1. Relying on Savigny's doctrine *(infra)*, Kaser points out that money conveys to its holder a "*Wertrecht*" (right to a value) which would enure to the possessor rather than to the owner of money.

2. German Civil Code 932, Austrian Civil Code 426, Swiss Civil Code 714.

3. For that reason questions of Conflict of Laws are infrequent in this field. In *De la Chaumette* v. *Bank of England*, B. & Ad. 385, 109 Eng. Rep. 1186 (1831), and in *Raphael and another* v. *Bank of England*, 17 C. B. 160, 139 Eng. Rep. 160, (1855), the bona fide acquisition in France of a stolen English banknote was declared valid under English law. French law was not invoked by the parties. Actually, the result would have been the same under French law.

4. Digest 46, 3, 78. The section is taken from the writings of Javolenus (d. 106 A.D.) who cites a certain Gaius (not the famous jurist of later date) as authority. Javolenus states this rule with regard to payments made by a debtor with another's money, but it doubtless applies to money transfers of any kind. It was so understood by the *Reichsgericht*, June 1, 1889, *R.G.Z.* 24, 307, applying Roman Law.

5. Niemeyer, "Über den Eigentumsübergang an Geld durch Vermischung", *Zeitschrift für das gesamte Handelsrecht* XLII (1894), 20.

which includes commingling, as conditions of the recipient's protection.[6] Under German and Swiss law mere transfer to a *bona fide* transferee is sufficient.[7] The latter better rule is also the Anglo-American law, except that protection of the transferee is conditioned on his giving a valuable consideration.[8] Good faith is not disproved by the fact that a transferee overlooked or regarded as unimportant, marks found on a coin or note.[9] A different rule would seriously impede the flow of circulating media throughout the community. The bona fide holder of bank notes is also protected by the law of negotiable instruments, but the protection afforded by the law of money is stronger.[10]

Regarding minglers of money who are not bona fide, Anglo-American law at first denied an *in rem* right to the owner of the

6. French Civil Code 1238; Italian Civil Code of 1865 Art. 1240, par. 2; Spanish Civil Code 1160; Dutch Civil Code 1420. Regarding the broad meaning of the Code term "consumption", cf. Planiol and Ripert, *Traité Pratique de Droit Civil Français* VII (1931) 483. Roman tradition is also evidenced in the fact that the rule is stated for payments only. Under the Austrian Civil Code 371, there is no cause of action if the money is indistinguishably mingled with other money, regardless, it seems, of *bona* or *mala fides*. The rule does not apply, however, where the money was mingled with a very slight amount of money belonging to the transferee. Austrian Supreme Court, March 29, 1904, *Sammlung von Zivilrechtlichen Entscheidungen* (New Series) VII, No. 2648.

7. German Civil Code 932; Swiss Civil Code 935. These Codes are moulding the rule in a general way, namely, as a rule regarding the transfer of (a special kind of) personal property. Commingling may be an independent ground for acquiring title. German Civil Code 947, Swiss Civil Code 727.

8. *Miller* v. *Race*, 1 Burr. 452, 97 Eng. Rep. 398 (K.B., 1758) (Lord Mansfield); *Clarke* v. *Shee*, 1 Cowper 197, 98 Eng. Rep. 1041 (K.B., 1774); *Moss* v. *Hancock*, [1899] 2 Q.B. 111 (Q.B., 1899); *Wyer* v. *Dorchester Bank*, 11 Cush. (65 Mass.) 51 (1853); *Depew* v. *Robards*, 17 Mo. 589 (1855); *Klauber* v. *Biggerstaff*, 47 Wisc. 551, 3 N.W. 357 (1879); *Merchants' Loan & Trust Co.* v. *Lamson*, 90 Ill.App. 18 (1892); *Nassau Bk.* v. *Nat. Bk. of Newburgh*, 159 N.Y. 456, 54 N.E. 66 (1899).

9. Contra in the case of a "rare" piece: Court Pont Audemer, August 1, 1900, *Pandectes Françaises Répertoire* (1903), "Monnaie et Médailles," no. 561.

10. In the case of banknotes—and this must be true of any money—the burden is on the plaintiff, claiming recovery, to prove that the holder acquired the notes *mala fide;* in the case of other negotiable instruments the holder must show his *bona fides*. *Wyer* v. *Dorchester & Milton Bank*, 11 Cush. (65 Mass.) 51 (1853); *Babcock v. Standish*, 53 N.J.Eq. 376, 384, 33 A. 385 (1895). The rule that an antecedent debt is not good consideration has long been abandoned in this situation. *Stephens* v. *Board of Education*, 79 N.Y. 183, 188 (1879).

commingled money if the money could not be identified—a rule similar in effect to the Roman one.[11] At present, however, the original owner may obtain reimbursement out of the whole quantity found in the mingler's possession, with priority over creditors of the mingler, either on the ground of an equitable claim to a proportionate share in the whole or on the ground of a lien upon it.[12] This is at least the American point of view.

In actions for conversion of money, the requirement that the money be specified has been considerably liberalized; while specification of the subject of the action is still called for, a description of the money in a general manner has been held sufficient.[13] This gives the injured person easier access to the advantages of an action for conversion.[14]

11. *Ex parte Dale & Co.*, 11 Ch. D. 772 (Ch., 1879); *Thompson's Appeal*, 22 Pa. 16 (1853); see *Bragg* v. *Osborn*, 147 Tenn. 381 at 384, 248 S.W. 19 at 20 (1923) ["The old rule undoubtedly was that, since money has no earmarks, it could not be followed when a trustee mingled his own with that of the cestui que trust. Our cases rather lead to the conclusion that there has been no relaxation of this rule in Tennessee."]

12. Restatement, *Restitution* (1937) § 209. For the modern development, see Scott, "Right to follow money wrongfully mingled with other money", 27 Harv. L. Rev. 125 (1913); Hirsch, "Tracing trust funds—modern doctrine, 11 Temple L.Q. 11, 15, (1936); Rhodes, "Tracing of assets" 30 Mich. L. Rev. 441 (1932).

13. *Gordon* v. *Hostetter*, 37 N.Y. 99 at 102 (1867) ["As the amount was conceded, there was no occasion to prove the particulars, in which the coin and bills in question differed from all others of like denomination . . . The money was identified so far as was needful to determine the rights of the parties; and the plaintiffs were bound to go no further."] Same: *Hazelton* v. *Locke*, 104 Me. 164, 71 A. 661 (1908). A situation repeatedly referred to in tort actions is that money was in a bag or otherwise earmarked. *Moss* v. *Hancock*, [1899] 2 Q.B. 111 (Q.B.) [argument of counsel]; *Knapp* v. *Springmeier*, 7 Ohio Dec. 570 (1878); see Blackstone *Comm.** III 152.

In replevin, it seems that the stricter rule obtains, requiring the money to be specifically described and the plaintiff to show himself entitled to the specific money described. *Sager* v. *Blain*, 44 N.Y. 445 (1871) ["clearly the plaintiff had no cause of action for the recovery of the possession of any identical or specific money. None was described . . . in the complaint, and no attempt was made to identify any by the evidence."]; *Dowdy* v. *Calvi*, 14 Ariz. 148, 125 P. 873 (1912) ["specific currency, gold and silver" need be described]; *Knapp* v. *Springmeier*, *supra*.

14. Such as the inadmissibility of a set-off by the defendant. See *Orton* v. *Butler*, 5 B. & Ald. 652, 106 Eng.Rep. 1329 (K.B., 1822). Other advantages given to a person who sues in tort may be the remedies of attachment and of arrest of the defendant. See, *Sager* v. *Blain*, 44 N.Y. 445, 448 (1871).

In English and American cases and writings, one frequently encounters the ancient axiom "money has no earmark." [15] This adage has no definite meaning. In the older cases it was used to *prevent* recovery of mingled moneys.[16] In modern cases it has sometimes been employed to *justify* recovery without strict identification.[17] In Lord Mansfield's opinion this doctrine meant that money might not be recovered from bona fide holders for value.[18] This seems to be its customary meaning.[19]

If payment is made in counterfeit money (coin or note) the recipient may, under the doctrine of rescission for mistake, treat the payment as a nullity; thereupon the payor, though innocent, has to make another and valid payment.[20] The payee, however, must make his demand within a reasonably short period.[21] Earlier cases also hold that in order to have recourse against his transferor, he must, within the same limit of time, return the counterfeit money to the innocent payor,[22] but the rule is neither

15. The maxim played a large part in medieval English law, see Pollock and Maitland, *History of English Law* II (2d ed., 1899) 151-2; *cf.* Eder, "Legal theories of money", 20 *Corn. L.Q.* 52 at 56 (1934). For a collection of English cases, see *The English and Empire Digest* XXXV (1927) 167.

16. Cases cited *supra*, n. 11.

17. "The more practical modern view is the holding that 'money has no earmarks' and that tracing coins and bills into a mass of cash and proving that it remained there is identification sufficient to permit tracing." Bogert, *Trusts and Trustees* (Rev.Ed., 1948) sec. 923; *cf. Farmers and Mechanics Nat. Bank* v. *King*, 57 Pa. 202 (1868) "An earmark is not indispensable to enable a real owner to assert his right of property or to its product or substitute." Other cases adopting liberal views of tracing have stated that the maxim has been expressly rejected so that in equity money may be "earmarked" and followed. See, *e. g.*, *Knatchbull* v. *Hallett*, 13 Ch.D. 696 (C.A., 1880); *cf.* Zollman, *Banks and Banking* X (1936) at 64-5.

18. In *Miller* v. *Race*, 1 Burr. 452 (K.B., 1758).

19. See *Stephens* v. *Board of Education*, 79 N.Y. 183 (1879); *Hatch* v. *Fourth Nat. Bank*, 147 N.Y. 184, 41 N.E. 403 (1895).

20. Williston, *Contracts* (rev. ed., 1937) sec. 1572; *Young* v. *Adams*, 6 Mass. 182 (1810), and other cases cited by Williston, *loc. cit.*, n. 1 and 2. Banks accepting counterfeits of their own notes in payment are denied recoupment against the innocent holders. Williston, *loc. cit.*, at n. 5. This exception is of questionable soundness. As to transactions in counterfeit *foreign* money, see *infra*, sec. 22 I; as to penal law, *supra*, p. 43.

21. *Markle* v. *Hatfield*, 2 Johns. (N. Y.) 455 (Ch. J. Kent, 1807); *President, etc., of the Gloucester Bank* v. *President, etc., of the Salem Bank*, 17 Mass. 23, 45 (1820); *Raymond* v. *Baar*, 13 Serg. & R. (Pa.) 318 (1825); *Curcier v. Pennock*, 14 *ibid.* 51 (1826); *Boyd* v. *Mexico Southern Bank*, 67 Mo. 537 (1878).

22. *Thomas* v. *Todd*, 6 Hill. (N.Y.) 340 (1844); *Simms v. Clark*, 11 Ill. 137 (1849).

absolute [23] nor well settled.[24] Nowadays, through the urging of the Treasury Department,[25] there has grown up a public willingness to turn counterfeit money over to the authorities immediately.[26]. The bank teller, in particular, will, for this purpose, retain counterfeit money that he has received.[27] Such a policy obviously deserves full support by the courts. It seems probable that the return of counterfeit money will no longer be considered a prerequisite of the recipient's claim for a valid payment.

II. Changing Money

A monetary transaction of a special kind is the changing of one type of national money into another. Though a very common transaction it is a somewhat curious phenomenon in law, related to sale and barter without being either of them. It is not sale because no commodity is involved; it is not barter because money is being dealt with at its nominal rather than at its intrinsic value. But it seems not profitable to plumb the problem of classification. Changing of money has given rise to very little judicial discussion except in connection with legal tender where that question of classification is irrelevant.[28]

23. *Burrill* v. *The Watertown Bank & Loan Co.*, 51 Barb. (N.Y.) 105, 112 (1867).

24. See the conflicting cases cited in Williston, *loc. cit.*, at n. 56. Under the English *Coinage Offences Act, 1936*, 25 & 26 Geo. V, c. 25, § 14, a person who suspects a gold or silver coin tendered to him to be counterfeit or otherwise adulterated may break it. In case the suspicion is justified, the loss falls upon the person who tendered the coin; in the opposite case it falls upon the person who broke it. Disputes will be settled summarily by the Justice of Peace.

25. Through public warnings and otherwise.

26. In England, there is a legal duty to this effect, though confined to coins under the *Coinage Offences Act* (*supra*, n. 24), § 11(2).

27. Officers of national banks must mark fraudulent notes, 31 U.S.C. 424.

28. *Supra*, p. 53. Another point is that banks ordinarily give change to their clients in counted-off packages or bundles. Notice of deficiency, if any, has to be given by the recipient at once, lest his right be waived. This was held by German courts during the inter-war period in cases not recorded.

The question of the juristic nature of changing has been thoroughly examined by Sigogne, *La Théorie Juridique de la Petite Monnaie* (thesis, Paris, 1942) 76 *et seq.*, from the viewpoint of French law where it turns chiefly on issues of criminal law. [A person who received a large money piece for change but fraudulently denied its receipt was held not to come under the penal provision of the Code Penal § 408, which does not embrace "*contrats d'échange*" (barter transactions)], Cass., July 9, 1905, *D.P.* 1907 I 55. In Germany, too, the question has been much discussed. See L. Goldschmidt, *Handbuch des Handelsrechts* (1868) 1104, n. 11; Wolff in

In the early law the changing of domestic money as well as of foreign money was part of the business of money changers (or "exchangers"). Under Edward III the King's exchangers, and no other persons, were permitted to profit from the exchange of gold for silver and vice versa.[29] This was part of the Crown's control over money.

Exchanging foreign money for domestic money is a sale of the former.[30]

III. Litigation on Specific Money

While the use of specific money in payments has decreased relatively little, litigation over specific money, not infrequent up to the nineteenth century, has become extremely rare.[31] This change results on the one hand from the greatly increased use of checks and bank remittances and on the other hand from the difficulty in identifying specific money considering the tremendous augmentation of current media, their increased velocity of circulation and their growing uniformity. Monetary legislation has more and more been absorbed by suits for debts and damages. Nevertheless the exceptional protection awarded by the law to the bona fide holder of money has preserved its significance as the crucial test in deciding whether the circulating *res* is or is not money. There are also some procedural rules connected with the money matter. As it is so often true in common law, the law of evidence lends some accompaniment to the melody of substantive law. Parol evidence is permissible where the meaning of money, for instance, "Canadian money" is involved.[32] A director of a bank has been considered a proper witness on foreign money [33] but a Nova Scotia court refused to hear an American

Ehrenbergs Handbuch des Handelsrechts, IV, 1 (1917) 626. Goldschmidt cites Arts. 903-906 of the New York Civil Code as subjecting the change of money to the law of sales. But this refers to the projected Code of David Dudley Field, which never became law in New York. It was, however, adopted in some other states. See, e. g., Montana Civil Code (1935 ed.), § 7635.

29. 25 Edward III, 12 (1350).

30. *Infra*, sec. 22 II.

31. A recent example would be *Zornes* v. *Bowen*, 223 Iowa 1141, 274 N.W. 877 (1937) [money as treasure trove]. The general trend is indicated by *Frothingham* v. *Morse*, 45 N.H. 545 (1864). Gold coins had been given as a loan, but only an action in assumpsit was allowed though gold was then at a premium.

32. *Thompson* v. *Sloan*, 23 Wend. (N. Y.) 71 (1840). Other instances listed in *American Jurisprudence*, "Evidence," sec. 1151 are related to past conditions.

33. *Third Nat. Bank of Chicago* v. *Cosby*, 43 Upper Canada Queens Bench Rep. 58 (1878).

consul regarding American monetary law,[34] on the ground of inexperience owing to his absence from the United States—a strange decision. Another procedural peculiarity consists in the fact that the sheriff is under an obligation which is not quite so evident as one would think,[35] to deliver to the creditor specific money taken from the debtor under a money judgment, conferring thereby title upon the creditor and discharging the debt.[36] Other goods levied upon he must ordinarily sell.

IV. Substitute Rights (Constructive Trust and Lien)

Even where the original owner of specific money—we call him "O"—is not prevented from following it against its recipient who, being an actual or constructive wrongdoer, may be called "W", O's claim for the specific money will frequently or perhaps ordinarily fail because the money has been spent by W or because it is unidentifiable. In civil law—which through its commingling rule further adds to the obstacles—O is in this situation reduced to the status of a general creditor of W. Not so the common law. If the proceeds of W's transaction can be traced into W's possession, O may enforce upon them a constructive trust, or, at his option, an equitable lien to secure his claim for reimbursement from the wrongdoer. Thus, if W loaned O's money to T, O could prevent W's general creditors from realizing on the debt owed to W by T. If T is himself mala fide, or did not give a valuable consideration, O would have the same *in rem* rights against T.[37] These rules obtain where W pays the money into his bank thereby adding to his deposit (bank account). The tracing of O's money in the bank assets is more difficult than in the assets of an individual, but common law has developed rules meeting the situation. If moneys of several persons are wrongfully mingled by W in his bank account, each of them is entitled

34. *Mackenzie* v. *Gordon*, 7 Nova Scotia Reports 153 (1867). On judicial notice of currency depreciation, *supra*, p. 31, n. 46.

35. Earlier English cases, particularly *Knight* v. *Criddle*, 9 East 48, 103 Eng.Rep. 491 (1807), by Lord Ellesborough, were understood to the effect that money could not be taken by attachment or execution because it cannot be sold, but this doctrine was not followed in the United States. *Prentiss* v. *Bliss*, 4 Vt. 513 (1832). Money in the pockets of the debtor, because not affected by the execution lien, apparently can not be seized under attachment. *Carmack* v. *Nichols*, 181 Tenn. 551, 181 S.W.2d 977 (1945).

36. The rule is sometimes made explicit in procedural codes, for instance, in the New York Civil Practice Act, sec. 686 (a special rule for gold coins was abrogated in 1940); the German Code of Civil Procedure (*Zivilprozessordnung*) 815; and the Austrian *Executionsordnung* 261.

37. Restatement, *Restitution*, §§ 202, 208(1), 172.

under common law to share in the mingled fund in such proportion as his money bore to the whole.[38] Elaborate rules regulate the effects of withdrawals from and additions to the mingled fund,[39] one rule providing that if W wholly or partly dissipates his bank account and subsequently adds to it through new deposits, O's *in rem* rights are limited to the lowest intermediary balance.[40] This canon, of course, cuts down O's protection severely and so does the fact that O must trace his very money into the bank account and produce evidence thereof. In case he does not succeed in this proof, or in case the intermediary balance is insignificant, only a personal claim against W is left for O, just as in civil law.

If W is a bank, the latter may be considered a "constructive" trustee from various points of view. The most important instance is that of "public moneys" namely, "moneys" of domestic governments and their subdivisions. Where such "moneys" are deposited with a bank, the latter is presumed to be familiar with the particular quality of the deposit. The bank will therefore be deemed a trustee "constructively",[41] and on this, as well as on other grounds,[42] governments and their subdivisions have often been granted preference over the general creditors of the bank.

38. Restatement, *Restitution*, § 213; there are doubts, however, whether later payments into the bank will be preferred over earlier payments. *In re Walter J. Schmidt*, 298 F. 314 (S.D.N.Y., 1923).

39. Restatement, *Restitution*, §§ 211, 212.

40. *Ibid.*, § 212, indicating exceptions.

41. See, e. g., *Grand Forks County* v. *Baird*, 54 N.D. 315, 209 N.W. 782 (1926); *State* v. *Bruce*, 17 Idaho 1, 102 P. 831 (1909). The tendency is to restrict this doctrine, 47 Harv.L. Rev. 841, 845 (1934); cf., *Polk County* v. *Farmer's State Bank of Bolivar*, 336 Mo. 1129, 82 S.W.2d 577 (1935).

We are not concerned with preferences arising in clearing situations under the Bank Collection Codes. See Zollmann, *The Law of Banks and Banking* XII 1939) App. 1.

42. Sovereignty prerogative has especially been invoked in this respect. Under English law the Crown was preferred when its claims conflicted with those of equal rank. *Quick's Case*, 9 Coke Rep. 129 at 129(b), 77 Eng.Rep. 916 at 917 (Court of Wards, 1611); Magna Charta, § 26 (1215), [§ 18 (1225)]; 25 Edw. III, St. 5, c. 19 (1350). The courts in this country have split on whether the prerogative rights of the Crown were "received" here. See Crane, "Royal prerogative in the United States," 34 W.Va.L.Q.Rev. 317 (1928). The more recent trend is to deny the "reception" (*Fry* v. *Equitable Trust Co.*, 264 Mich. 165, 249 N.W. 619 [1933]; *Board of County Commissioners of San Miguel* v. *McFerson*, 90 Colo. 408, 9 P.2d 614 [1932]; *State ex rel. Village of Warrensville Heights* v. *Fulton*, 128 Ohio St. 192, 190 N.E. 383 [1934]), or, to limit its effect (see 47 Harv.L.Rev. 842 [1934]), and particularly not to extend it to political subdivisions,

The situation is further complicated by a time-honored presumption of Anglo-American law according to which if O gives money to C for transmission to T, C must convey as a fiduciary the same money to T.[43] If C violates his duty and employs the money for his own purposes he turns into a "W". O will be given priority over C's general creditors. However, under modern conditions the expectation underlying the presumption is unrealistic. C will ordinarily send T a check or a money order, or in continental countries will employ the customary method of bank remittance. Consequently C, as was O's intention, will keep the specific money received for his own use. In most cases it will therefore not be very difficult to refute the presumption of a fiduciary relationship. The presumption is, in fact, being abandoned where C is a bank[44] and it seems to be disappearing generally.[45] Hence this particular rule is no longer of practical importance.

such as cities, counties, school districts, etc. *People ex rel. Nelson* v. *Home State Bank*, 338 Ill. 179, 170 N.E. 205 (1930); *County Court* v. *Matthews*, 99 W.Va. 483, 129 S.E. 399 (1925); *County of Glynn* v. *Brunswick Terminal Co.*, 101 Ga. 244, 28 S.E. 604 (1897). Federal moneys are given priority by 31 U. S.C. 191 (based upon Act of March 3, 1797, § 5, 1 Stat. 512 at 515), except where a National bank is the depository. *Cook County Nat. Bank* v. *U. S.*, 107 U.S. 445, 2 S.Ct. 561, 27 L.Ed. 537 (1885).

43. See Stone, "Some legal problems involved in the transmission of funds," 21 Col.L.Rev. 507 (1921).

44. Even in states where a deposit for a special purpose may create a fiduciary relationship—*infra*, p. 106,—only a contractual relationship is set up between the sender and the transmitting bank according to the ascendant opinion. *E. g.*, *Katcher* v. *American Exp. Co.*, 94 N.J.L. 165, 109 A. 741 (1920); *Legniti* v. *Mechanics Bank*, 230 N.Y. 415, 130 N.E. 597 (1921); *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.*, 172 App.Div. 16, 157 N.Y. S. 955 (1916); *Gravenhorst* v. *Zimmerman*, 236 N.Y. 22, 139 N.E. 766 (1923); *Beecher* v. *Cosmopolitan Trust Co.*, 239 Mass. 48, 131 N.E. 338 (1921); *Samuels* v. *E. F. Drew & Co.*, 296 F. 882 (C.C.A.2d 1924).

45. Thus it has been held that an agent for collection of the premiums of insurance policies is generally under no duty to deliver the specific money received to his principal. *Hazelton* v. *Locke*, 104 Me. 164, 71 A. 661 (1908); cf. *Cherry* v. *Paller*, 91 Pa.Super. 417 (1927); *Tribune Pub. Co.* v. *Davis*, 114 Me. 371, 96 A. 385 (1916). And no fiduciary relationship will generally be impressed upon an agent who has received money from the plaintiff to be spent for a particular purpose. *Larson* v. *Dawson*, 24 R.I. 317, 53 A. 93 (1902); *Kerwin* v. *Balhatchett*, 147 Ill.App. 561 (1909); *Orton* v. *Butler*, 5 B. & Ald. 652, 106 Eng. Rep. 1329 (K.B.1822). See Note, 19 Harv.L.Rev. 55 (1905); 21 Col.L. Rev. 827 (1921); 50 A.L.R. 1167 at 1170 (1927), and, generally, Scott *On Trusts* (1939, with Annual Supplements) sec. 252.

To sum up, under common law, the owner of specific money whose original *in rem* claim has actually become ineffectual is given instead an *in rem* substitute. This is a fruit of flexible equity jurisprudence which has no real counterpart in civil law. The granting of the *in rem* substitute is by no means confined to the transfer of specific money. Immeasurably more important are cases where O gives a check or, in continental countries, makes a bank remittance. The point is that the objects of the rule are not specific moneys, but "funds" coming from O and being traced from him to the recipient or perhaps to several consecutive recipients. In nontechnical language not improper in equity, the "funds" are spoken of as "moneys". We have mentioned "public moneys", but there are other examples.[46]

One is confronted here with a significant diversity of common law and civil law, a diversity opening vistas which far exceed the scope of the present discussion. No doubt common law offers a better opportunity to avoid inequities and often conforms more closely to the goal of true justice, but on the other hand it tends to create clandestine preferences, that jeopardize general creditors and thereby the credit system. The trend of decisions shows that this danger is being recognized in this country and that the "constructive trust" rule is more and more applied in a guarded way, especially where banks are involved as recipients. This trend deserves every support.

Section 8

BANK DEPOSITS

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I. Definition and Legal Nature

A bank deposit, in the phraseology of modern banking,[1] may be defined as a bank credit to a person upon payment to the bank or

46. An instance is New York Real Property Law § 233 (enacted 1935). It provides that if money has been "deposited" by a tenant as security for performance of the contract, "such money with interest, if any, shall continue to be money of the person making the deposit and shall be treated as a trust. . . ." This undoubtedly covers the ordinary procedure where the tenant gives a check for security purposes. The check will be collected by the landlord's bank and credited to the landlord, but it remains "money of the tenant." The reference to the possible "interest" accruing to the deposit is significant.

1. In England the term "bank deposit" is sometimes understood to

The situation is further complicated by a time-honored presumption of Anglo-American law according to which if O gives money to C for transmission to T, C must convey as a fiduciary the same money to T.[43] If C violates his duty and employs the money for his own purposes he turns into a "W". O will be given priority over C's general creditors. However, under modern conditions the expectation underlying the presumption is unrealistic. C will ordinarily send T a check or a money order, or in continental countries will employ the customary method of bank remittance. Consequently C, as was O's intention, will keep the specific money received for his own use. In most cases it will therefore not be very difficult to refute the presumption of a fiduciary relationship. The presumption is, in fact, being abandoned where C is a bank [44] and it seems to be disappearing generally.[45] Hence this particular rule is no longer of practical importance.

such as cities, counties, school districts, etc. *People ex rel. Nelson* v. *Home State Bank*, 338 Ill. 179, 170 N.E. 205 (1930); *County Court* v. *Matthews*, 99 W.Va. 483, 129 S.E. 399 (1925); *County of Glynn* v. *Brunswick Terminal Co.*, 101 Ga. 244, 28 S.E. 604 (1897). Federal moneys are given priority by 31 U. S.C. 191 (based upon Act of March 3, 1797, § 5, 1 Stat. 512 at 515), except where a National bank is the depository. *Cook County Nat. Bank* v. *U. S.*, 107 U.S. 445, 2 S.Ct. 561, 27 L.Ed. 537 (1885).

43. See Stone, "Some legal problems involved in the transmission of funds," 21 Col.L.Rev. 507 (1921).

44. Even in states where a deposit for a special purpose may create a fiduciary relationship—*infra*, p. 106,—only a contractual relationship is set up between the sender and the transmitting bank according to the ascendant opinion. *E. g.*, *Katcher* v. *American Exp. Co.*, 94 N.J.L. 165, 109 A. 741 (1920); *Legniti* v. *Mechanics Bank*, 230 N.Y. 415, 130 N.E. 597 (1921); *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.*, 172 App.Div. 16, 157 N.Y. S. 955 (1916); *Gravenhorst* v. *Zimmerman*, 236 N.Y. 22, 139 N.E. 766 (1923); *Beecher* v. *Cosmopolitan Trust Co.*, 239 Mass. 48, 131 N.E. 338 (1921); *Samuels* v. *E. F. Drew & Co.*, 296 F. 882 (C.C.A.2d 1924).

45. Thus it has been held that an agent for collection of the premiums of insurance policies is generally under no duty to deliver the specific money received to his principal. *Hazelton* v. *Locke*, 104 Me. 164, 71 A. 661 (1908); cf. *Cherry* v. *Paller*, 91 Pa.Super. 417 (1927); *Tribune Pub. Co.* v. *Davis*, 114 Me. 371, 96 A. 385 (1916). And no fiduciary relationship will generally be impressed upon an agent who has received money from the plaintiff to be spent for a particular purpose. *Larson* v. *Dawson*, 24 R.I. 317, 53 A. 93 (1902); *Kerwin* v. *Balhatchett*, 147 Ill.App. 561 (1909); *Orton* v. *Butler*, 5 B. & Ald. 652, 106 Eng. Rep. 1329 (K.B.1822). See Note, 19 Harv.L.Rev. 55 (1905); 21 Col.L. Rev. 827 (1921); 50 A.L.R. 1167 at 1170 (1927), and, generally, Scott *On Trusts* (1939, with Annual Supplements) sec. 252.

To sum up, under common law, the owner of specific money whose original *in rem* claim has actually become ineffectual is given instead an *in rem* substitute. This is a fruit of flexible equity jurisprudence which has no real counterpart in civil law. The granting of the *in rem* substitute is by no means confined to the transfer of specific money. Immeasurably more important are cases where O gives a check or, in continental countries, makes a bank remittance. The point is that the objects of the rule are not specific moneys, but "funds" coming from O and being traced from him to the recipient or perhaps to several consecutive recipients. In nontechnical language not improper in equity, the "funds" are spoken of as "moneys". We have mentioned "public moneys", but there are other examples.[46]

One is confronted here with a significant diversity of common law and civil law, a diversity opening vistas which far exceed the scope of the present discussion. No doubt common law offers a better opportunity to avoid inequities and often conforms more closely to the goal of true justice, but on the other hand it tends to create clandestine preferences, that jeopardize general creditors and thereby the credit system. The trend of decisions shows that this danger is being recognized in this country and that the "constructive trust" rule is more and more applied in a guarded way, especially where banks are involved as recipients. This trend deserves every support.

Section 8

BANK DEPOSITS

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I. Definition and Legal Nature

A bank deposit, in the phraseology of modern banking,[1] may be defined as a bank credit to a person upon payment to the bank or

46. An instance is New York Real Property Law § 233 (enacted 1935). It provides that if money has been "deposited" by a tenant as security for performance of the contract, "such money with interest, if any, shall continue to be money of the person making the deposit and shall be treated as a trust. . . ." This undoubtedly covers the ordinary procedure where the tenant gives a check for security purposes. The check will be collected by the landlord's bank and credited to the landlord, but it remains "money of the tenant." The reference to the possible "interest" accruing to the deposit is significant.

1. In England the term "bank deposit" is sometimes understood to

upon an equivalent act, with the intent of having the sum kept safe and ready for his use. "Payment" presupposes a transfer of title in the money to the bank, and the main instance of "equivalent acts" is the crediting of collected checks or of other commercial papers.[2] Hence, the original concept of "deposit", requiring a bail of individual goods, has been abandoned in the term "bank deposit". Delivering the money to the bank with the intention of safekeeping is understood as a "deposit" in a very broad sense of the word.[3]

An ordinary bank deposit therefore constitutes a debt of the bank to the depositor. To the extent that the deposit was created by payment, the money becomes the bank's asset which the bank may use as it pleases,[4] except for statutory restrictions. No corporeal execution on the money will lie in favor of the judgment creditor of the "depositor" (*i. e.*, of the holder of the credit).[5]

mean time deposits only, *infra*, n. 32.

2. "A depositor is one who delivers to, or leaves with a bank money, or checks, or drafts, the commercial equivalents of money, subject to his order, and by virtue of which action, title to the money passes to the bank." *Kidder* v. *Hall*, 113 Tex. 49 at 56, 251 S.W. 497 at 499 (1923).

3. Special definitions may be chosen for particular legislative purposes. The Banking Act of 1935, 49 Stat. 684, 12 U.S.C. 264(c) (12), instituting the Federal Deposit Insurance, includes in the term deposit "the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit" as well as certain trust funds—a formula indicating the broad objectives of the law. The original bill, more closely conforming with common notions, read: ". . . has given unconditional credit." *Hearings before the Committee on Banking and Currency*, House of Representatives, 74th Cong., on H.R. 5337. The Federal Reserve Act of 1913, § 16, 38 Stat. 251 at 266, 12 U.S.C. 413, providing for certain reserves to be held against "deposits", left the definition to the Federal Reserve Board (now the Board of Governors of the Federal Reserve System). An international definition is contained in the German-Russian treaty of August 27, 1918 (R.G.Bl. 1918, 1153 at 1180) where *Bankguthaben* are interpreted as "mature debts held against banks and monetary institutions."

4. Michie, *The Law of Banks and Banking* V (1932) c. 9, secs. 3 and 4b, giving numerous references. Remarkable for its authority and lucidity is *Foley* v. *Hill*, 2 H.L.C. 28 at pp. 35 to 38, 9 Eng.Rep. 1002 (H. of L., 1848) (by L. Ch. Tottenham).

5. *National Bank* v. *Young*, 125 Ill. App. 139 (1905); *Wash* v. *Hendrick*, 143 Ky. 443, 136 S.W. 883 (1911); *McManus* v. *Bank of Greenwood*, 171 S.C. 84, 171 S.E. 473 (1933). *Deakman* v. *Odd Fellows Hall Ass'n of N. J.*, 11 N.J.Misc. 646, 167 A. 741 (1933), does not seem to be contrary. A New Jersey statute rendered customary writs of execution good also for the purpose of

The latter has only a chose in action, and in the case of the bank's insolvency he will not be a privileged creditor.[6] Only in a broad and nontechnical sense may the relationship of the depositary bank to the depositor be considered a fiduciary one. No trust proper nor bailment is involved. The contrary view would lay an unbearable burden upon banking business.[7]

A bank deposit is not a loan to the bank. "A loan is primarily for the benefit of the bank, a deposit is primarily for the benefit of the depositor." [8] The distinction was well known in ancient Roman law where the *"depositum irregulare"* was contrasted with the *"mutuum"*. The former was not a feature peculiar to banking, but a broad concept applying to fungible things conveyed by the "depositor" to the "depositary".[9] As at present, special legis-

levying on the rights and *credits* (in the case at bar, on a bank account) of a judgment debtor. This merely constituted an extension of the "execution" form and technique to acts which really were garnishments.

6. *Mobley* v. *Jackson*, 171 Ga. 434, 156 S.E. 23 (1930); see also *Reichsgericht*, Dec. 2, 1918, *R.G.Z.* 94, 191 at 194.

7. See particularly *Foley* v. *Hill*, *cit. supra*, n. 4.

8. *Schumacher* v. *Eastern Bank*, *etc.*, 52 F.2d 925 at 927 (C.C.A.4th, 1931), explaining: "A loan is not subject to check; a deposit ordinarily is. A loan usually arises from the necessities of the borrowing bank; a deposit from the confidence of the depositor in its strength. A loan ordinarily is sought by the bank for its own purposes; a deposit is ordinarily made by the depositor for purposes of his own." This case held that it was *ultra vires* for the bank to give collateral for its deposit, but it was not *ultra vires* to give it for a loan. See also *Divide County* v. *Baird*, 55 N.D. 45, 212 N. W. 236 (1926); *Leach* v. *Beazley*, 201 Iowa 337, 207 N.W. 374 (1926); *State ex rel. Spillman* v. *Nebraska State Bank of Harvard*, 118 Neb. 660, 225 N.W. 778 (1929). The word "loan" when applied in American decisions to bank deposits, ordinarily is intended to differentiate the deposit from a bailment or a trust fund. This is the real significance of the cases generally cited for the proposition that a bank deposit is a loan (5 Michie, *op. cit.*, c. 9, sec. 4a, n. 57). See, *e. g.*, *Deposit Guarantee Bank v. Merchants' Bank Co.*, 171 Miss. 553, 158 So. 136 (1934). However, in order to effectuate the particular intent of a statute, a bank deposit may be encompassed within the term "loan". *Bank* v. *Lanier*, 11 Wall. (78 U.S.) 369 (1871) [bank deposit by a bank with the depositary's own stock given as security held invalid as controverting a statute forbidding "any loan or discount on the security of the shares of a bank's own capital stock"]. In English law, the distinction between bank deposit and loan apparently is not recognized. It was rejected in *Pott* v. *Clegg*, 16 M. & W. 321, 153 Eng.Rep. 1212 (Exch. 1847). Pollock, C. B., expressed his doubts as to the equivalence of loan and bank deposit. In that case the statute of limitations in respect to loans was applied to a bank deposit. It is doubtful whether the theory of the case would stand today.

9. See Girard, *Manuel Elémentaire de Droit Romain* (8th ed., 1929) 564.

lative restrictions upon loans did not apply to "irregular deposits".[10] Canon law was at a later date concerned with this problem, since there was much discussion of whether the scriptural prohibition of interest applied to interest allowed by depositary bankers.[11] Modern civil law has on the whole adopted the Roman doctrine.[12] Recently in the United States the introduction of the Federal Deposit Insurance,[13] which does not apply to loans, has given the distinction between "loan" and "bank deposit" a novel and highly practical significance.

The relatively plain legal picture as outlined is somewhat disturbed in Anglo-American law by the rules which, on the theory of trusts and other equitable grounds, grant certain depositors preference over general creditors in the case of the bank's insolvency. Regarding express trusts, the disturbance is perhaps not so grave because the bank will probably show such preferential liabilities separately in its balance sheets and public statements. But the situation is different with respect to constructive trust and similar fiduciary relations which are frequently dubious in character and possibly unknown to the bank itself. Apart from the cases in which the bank is made liable as a trustee, *ex maleficio,* for a conversion of money, the preference of public funds and of funds to be transmitted to a third person are in point.[14] Moreover, American practice has developed a theory under which deposits for specific purposes known to the bank may likewise enjoy preference.[15] Fortunately, the courts have become circum-

10. *E. g.*, the *Senatusconsultum Macedonianum* prohibiting loans to *filii familias*, was not applied to irregular deposits. Girard, 565, n. 1.

11. See Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtsordnung* I (1874) 429.

12. It has expressly been set out in the German Civil Code 700. As to French law, see Planiol, *Traité Elémentaire de Droit* Civil II (11th ed., 1935), n. 2213 *et seq.* The Italian Civil Code of 1942 regulates loans and bank deposits separately, §§ 1813 *et seq.*, 1834 *et seq.*

13. *Banking Act* of 1935, § 101, 49 Stat. 684, 12 U.S.C. 264(c) (12). Prior to the enactment of federal insurance, systems of deposit guaranty existed in eight of the western states ("Note", *Federal Reserve Bulletin* 1925, 626) under which the distinction between loans and deposits was developed in protracted litigation. *E. g.*, *State ex rel. Spillman* v. *Nebraska State Bank of Harrard*, 118 Neb. 660, 225 N.W. 778 (1929); *First National Bank* v. *Hirning*, 48 S.D. 417, 204 N.W. 901 (1925); see 1 Michie, *supra*, n. 4, at c. 1, sec. 43.

14. *Supra*, p. 102.

15. Zollman, *The Law of Banks and Banking* (1936, with cumulative pocket parts), V, secs. 3571 *et seq.*; Note, 37 Mich.L.Rev. 470 (1939). An example is *Tittow* v. *Sundquist*, 234 F. 613 (C.C.A.9th, 1916).

spect in defining the conditions under which the preference will be allowed.[16]

"Special deposit" is something fundamentally different from the "deposit for specific purposes". It refers to things given to the bank in custody only and therefore to be returned to the depositor in kind. Except for money contained in a sealed envelope or a locked box, special deposits of money are infrequent. Money in "special deposit" is temporarily withdrawn from circulation; money deposited "for specific purposes" is not. Courts sometimes use the term "special deposit" where, in reality, a deposit "for specific purposes" exists.

II. Bank Deposits as Money

The bank deposit (or "bank account") is connected with the money concept first, by its being a "debt", that is an obligation to be discharged in money. In addition, there is another relation between a bank deposit and money peculiar to the former and distinguishing it from an ordinary debt.[17] Bank deposits are themselves dealt with as money to a certain extent. Like money, they serve as stores of value. The depositor "has his money in the bank". The bank is supposed to be safe, able and willing to disburse the money, partly or entirely, at any time on demand, provided there is no stipulation to the contrary. The risk of the bank's becoming insolvent is not too seriously contemplated by the depositor who desires first of all to escape the risk involved in keeping the money at home. In "depositing" it with a bank he feels certain that this bank at this time is positively trustworthy.[18] That trend has been strengthened in the United States by enforcement of reserve requirements for bank deposits and by the federal insurance of banking accounts up to $5000, making such accounts "fungible" and thereby more money-like. Interest being of secondary concern to the depositor, the interest rate will remain considerably below the loan interest rate or disappear entirely.[19] This transformation from corporeal money to a chose

16. See, *e. g.*, *In re Interborough Consol. Corporation*, 288 F. 334 (C.C.A.2d, 1923) [concerning a deposit for the payment of interest coupons], and *Keyes* v. *Paducah & Ill. R. Co.*, 61 F.2d 611 (C.C.A.6th, 1932) [concerning proceeds of a draft deposited, for procedural reasons, pursuant to an order of the court].

17. The peculiarity of a bank deposit, as compared with other debts, is pointed out, *e. g.*, *In re Hallet's Estate*, 13 Ch.D. 696, 728 (C.A., 1880).

18. *In re Banfield's Estate*, 137 Or. 256, 299 P. 323, 3 P.2d 116 (1931), it was held that a deposit in a bank insolvent at the time of testation would not be included in a bequest of the "money" of the testator.

19. Member banks of the Federal

in action, so vital in law, is often treated as a rather technical occurrence not affecting the identity of the object. Therefore, the bank deposit is visualized as money; [20] and this is quite commonly done by economists. They use such terms as "bank money", "deposit currency", "*monnaie scripturale*", etc. To numerous economists bank deposits are even the primary form of money.[21] This is an undue generalization of financial conditions prevailing in the Anglo-Saxon countries. Besides, the behavior and potency of specific money on the one hand and of bank deposits on the other, differ. Their indiscriminatory treatment has also been objected to by some economists.[22] We need not stress this point here.[23] In law the disparity is no doubt basic and palpable.[24] On this statement a noted economist [25] has commented

Reserve System are forbidden to pay interest on demand deposits, Act of June 16, 1933, § 11(b), 48 Stat. 181, 12 U.S.C. 371a.

20. In *Reference Re Alberta Statutes, The Bank Taxation Act*, etc., [1938] S.C.R. 100, 156 (Sup.Ct. of Canada, 1938), the point was made that bank credit, even if not based on deposit, is "credit money." On this remarkable case *infra*, p. 124.

21. This is particularly the opinion of Hawtrey, *The Gold Standard in Theory and Practice* (1939). He really asserts (p. 8) that bank credit can exist without money. Still bank credit can evidently not exist without a monetary system and a currency pertaining to it.

22. Cf. Cannan, *Modern Currency* (1931) 88,—emphasizing, among other reasons, that bank deposits have not the same effect upon prices as actual currency has,—and Baudin, *La Monnaie et la Formation des Prix* (2d ed., 1947) 315, 635.

23. For a helpful survey of the economic theory of deposit currency see Baudin, *supra*, Part II, chap. 6. The national diversities in the use of bank accounts, largely neglected by the Anglo-American school of thought, are there referred to on pp. 315 *et seq.*

24. See *Wheeling Steel Corporation v. Fox*, 298 U.S. 193, 214, 56 S.Ct. 733, 80 L.Ed. 1143 (1936), where it is emphasized that "money in bank" is an indebtedness. In *Reichsgericht*, Oct. 14, 1931, *R.G.Z.* 134, 73, 76, it is pointed out that bank remittances are used as *media of payment* and as *Verkehrsgeld* ("customary money"). However, the Court continues: "The legal nature of remittance is as little defined by this statement as is the legal essence of bills of exchange by calling them 'merchant's paper money.'" The judgment then applies general contract rules to the remittance. By overstressing the monetary implications of bank deposits one writer suggests that there is no undivided legal doctrine of money; monetary system and debt are, in his opinion, two entirely independent matters. Isele, "Geldschuld und bargeldloser Zahlungsverkehr," *Archiv für die Civilistische Praxis* CXXIX (1928) 129, 184. On the historical "bank money" (*mark banco*) see *infra*, sec. 15 IV.

Differentiation between tangible money and bank deposits can in no way be based on the nominalist doctrine. Bank accounts partake of the nominalist character of the monetary unit in which they are expressed. This has been misunderstood by de Chazeau, 27 Va.L. Rev. 250 (1940).

25. Albert G. Hart, 7 U. of Ch.L. Rev. 197 (1930).

that there is not much difference between records of bankers and bank notes which, after all, are likewise papers with ink on them. Such an objection ignores the fundamental distinction of tangibles and intangibles in law. It should be evident that the "records" referred to by the critic do not circulate in any way like bank notes. Legally, bank notes are transferred by delivery; bank deposits, like other debts, by assignment (though such an assignment is a rare occurrence). This diversity, in itself of signal importance in law, is accentuated by the fact that the *bona fide* assignee of a legally defective bank account does not enjoy a protection similar to the one enjoyed by a *bona fide* holder of tangible money. When, for instance, "X", a client, is credited through inadvertence or mistake of the bank, on the order of "X's" debtor who actually had no funds to draw from, the credit is subject to cancellation by the bank.[26] And there are other diversities. Forced execution into corporeal money is an easy affair, whereas in the case of a bank deposit the cumbrous procedure of garnishment must be followed. Furthermore, under an American rule, bank deposits or their transfer may be taxed at the domicile of the holder, whereas money proper, as tangible property can be taxed only by the state of the *situs* thereof.[27]

26. "It requires no lengthy citation of authority to establish that a bank is not liable for the amount of a credit given for a deposit when in fact no such deposit was made." *American Nat. Ins. Co.* v. *Marine Bank and Trust Co.*, 167 La. 153, 118 S.E. 871 at 872 (1928). Accord: *West Frankfort Bank and Trust Co.* v. *Barretti*, 206 Ill.App. 261 (1917).

As to French law, see Drouillat, *Étude Juridique du Virement en Banque* (thesis Poitiers, 1931) 160, referring to App. Paris, Feb. 14, 1832, *Sirey* 1833 II 623, which, however, does not exactly meet the situation envisaged above. At any rate, the bank would be protected by the doctrine of "non-existent cause", Planiol, *Traité Elémentaire de Droit Civil* II (11th ed., 1935) no. 1026, *et seq.* The *Reichsgericht*, March 20, 1914, *Monatsschrift fuer Handelsrecht und Bankwesen* 1914, 152, while recognizing the existence of an "abstract" contract between X and the Bank, held good a "recoupment" by the bank of the debt incurred, X having been "unjustly enriched" by that contract. German Civil Code 811, par. 2.

27. *Blodgett* v. *Silberman*, 277 U.S. 1, 48 S.Ct. 410, 72 L.Ed. 749 (1928). Although decided prior to the recent line of Supreme Court decisions invalidating "double taxation" of intangibles (as well as tangibles) by the States, this decision represents the present law of the Court. Cf. *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, 51 S.Ct. 54, 75 L.Ed. 131 (1930) [an inheritance tax may not be levied by the State of the debtor's domicile upon open accounts or credits); cf. 35 Col.L.Rev. 1151 (1935)]. Where bank deposits have secured a "business situs," the State of the situs may tax the account, probably to the exclusion of the State of the creditor's domicile. *Wheeling Steel Corporation* v. *Fox*, 298 U.S. 193, 56 S.Ct. 733,

Tax statutes distinguish between "money" and "solvent credits".[28] These instances are by no means exhaustive.[29] Attempts at "monetizing" bank accounts may even lead courts into confusion.[30]

80 L.Ed. 1143 (1936); see 85 U. of Pa.L.Rev. 121 (1936).

28. Thus, when tax statutes allowed the taxpayer to deduct debts owed by him only from "solvent credits," bank deposits were considered as "solvent credits," not as "money." *Roberts* v. *Lynch*, 56 Utah 346, 190 P. 930 (1920). Contra: *Gray* v. *Street Com'rs of City of Boston*, 138 Mass. 414 (1885). Some States have resolved the controversy by legislative definition, as N.D.Comp. Laws (1943) ch. 57-0201 ["The word 'money' or 'moneys' means gold and silver coin, treasury notes, bank notes and every deposit which any person owning the same or holding in trust is entitled to withdraw as money or on demand."]. Similarly Ohio Gen.Code (1948) § 5326, but even under this statute the diversity between money and bank deposit was judicially recognized. *Cleveland and Western Coal Co.* v. *O'Brien*, 8 Ohio App. 247 (1917), aff'd 98 Ohio St. 14, 120 N.E. 214 (1918).

29. A bank deposit may be "money due", that is a debt, and therefore distinguishable from tangible money. Thus, under a homestead statute exempting real and personal property from levy and sale and excluding from this privilege money, salary, or wages due to the debtor, it was held that a bank deposit was not exempt since it fell within the category of money due him. *Morris Plan Bank* v. *Viona*, 122 Ohio St. 28, 170 N.E. 650 (1930).

If, for reasons of social policy, a certain "money due" is immune from garnishment, and has been placed into a bank account, the question arises whether the immunity applies also to the bank deposit. Chief Justice Cardozo, in an admirable opinion, answered the question affirmatively in the case of "money due" under a workmen's compensation statute, O'Brien, J., writing an able dissent. *Surace* v. *Danna*, 248 N.Y. 18, 161 N.E. 315 (1928). The same result was reached with respect to pensions and similar sums paid into a bank account. *Second National Bank of Greenville* v. *Hoblit*, 41 Ohio App. 126, 179 N.E. 812 (1931) [under federal statute exempting proceeds of loans on adjusted war service certificates]; *Stockwell* v. *Nat. Bank of Malone*, 36 Hun (N.Y.) 583 (1885); *Gaddy* v. *First Nat. Bank*, 115 Tex. 393, 283 S.W. 472 (1926); *Mobley* v. *Jackson*, 171 Ga. 434, 156 S.E. 23 (1930). Sometimes immunity is explicitly extended by statute to deposited pension money. *Iowa Code* (1927) § 11761 [now (1946) § 627.1] discussed in *Appanoose County* v. *Henke*, 207 Iowa 835, 223 N.W. 876 (1929).

30. This is illustrated by a decision of the *Reichsgericht*, Nov. 29, 1922, *R.G.Z.* 105, 398. The son of a client of an Egyptian bank had, without any authority from his father, caused the bank to remit a sum, against the father's account and on the father's behalf, to a bank in Germany from which he collected the sum. On a suit brought by the father against the German bank, the Court held the bank liable in the amount of this sum to the plaintiff because the bank had wrongfully delivered to the son "money" which, "economically speaking," belonged to the plaintiff. Still, the Court did not pose the question of whether the Egyptian

On the other hand, situations do exist where in legal contemplation also, the term "money" encompasses bank deposits. By far the most important instance is the use of the expression "money" in wills. There, it is generally assumed that a testator speaking of "money" wants to include his ordinary bank deposits.[31] According to circumstances this view has been extended to time deposits [32] and savings accounts.[33] Furthermore, statutes referring to "money" have been construed as including general bank deposits.[34] A rather unexpected but well founded assimila-

bank was entitled to charge the father's account with the amount remitted. If the bank, as it seems, was not, the money, "economically speaking," would not have "belonged" to the father.

31. *Lyons* v. *Lyons*, 233 F. 744 (C.C. A.4th, 1916); *Beit* v. *Beit*, 98 Conn. 274, 119 A. 144 (1922); *Matter of McKendrie*, 150 Misc. 665, 271 N.Y. S. 228 (Surr.Ct. Richmond Co., 1934); *In re Johnston's Estate*, 190 Iowa 679, 180 N.W. 740 (1919); *Baldwin* v. *Baldwin*, 107 N.J.Eq. 91, 151 A. 741 (1930); *In re Bunfield's Estate*, 137 Or. 256, 3 P.2d 116 (1931); *McCullen* v. *Daughtry*, 196 N.C. 215, 129 S.E. 611 (1925). *Cf. Adams* v. *Jones*, 59 N.C. 221 (1861) [a will directed collection of debts and investments; bank deposits because "commonly regarded as cash" were not included; *Wyatt* v. *Norris*, 66 W.Va. 667, 66 S.E. 1016 (1912). English law is in accord, *supra*, p. 21.

32. *Lyons v. Lyons*, 233 F. 744 (C. C.A.4th, 1916); *In re Johnston's Estate*, 190 Iowa 679, 180 N.W. 740 (1919). The English rule is stated in *Mannings* v. *Purcell*, 7 De G.M. and G. 55, 44 Eng.Rep. 21 (Ch.App., 1855) and particularly *In re Collings*, [1933] Ch. 920 (Ch., 1933), where it is pointed out that time deposits are included in money "in the strict sense of the word". In this case, however, time deposits are termed "bank deposits" as distinguished from "money on current account" (call money). Time deposits were not held to be included in a bequest of ready money in *In re Wheeler, Hankinson* v. *Hayter*, [1904] 2 Ch. 66 (Ch., 1904); *In re Price, Price* v. *Newton*, [1905] 2 Ch. 55 (Ch.); *In re Boorer*, [1908] Weekly Notes 189 (Ch., 1908).

33. Thus in *Hancock* v. *Lyon*, 67 N. H. 216, 29 A. 638 (1892), a bequest of money was held not to include a savings bank deposit, the bank being located at some distance and withdrawal being permitted only at certain times and under certain conditions prescribed by the rules of the bank.

34. *Critchfield* v. *Nance County*, 77 Neb. 807, 110 N.W. 508 (1906); *Gray* v. *Street Comm'rs of City of Boston*, 138 Mass. 414, 415 (1885) [both concerning taxation]. The action for money had and received has been applied to the transfer of funds from one bank account to another. *Earle* v. *Whiting*, 196 Mass. 371, 82 N.E. 32 (1907), but this is not significant because the action has generally been given a broad scope. See *Barnett* v. *Warren*, 82 Ala. 557, 2 So. 457 (1887) [action covers property received as the equivalent of money]; *Todd* v. *Bettingen*, 190 Minn. 493, 124 N.W. 443 (1910) [action covers stock]; *Bianconi* v. *Crowley*, 256 Mass. 187, 152 N.E. 305 (1926) [action applies to credit]. Bank deposits do not come under the term "money" within the purview of the Trading with the Enemy Act of 1917, 40 Stat. 411, 417, § 87c., 50 U.

tion of bank deposits to money occurred in revaluation after inflation. Currency and bank deposits will be exempt from revaluation just as well as specific money, which obviously cannot be revalued. Similarly, general revaluation of deposits would be unbearable for banks. The German revaluation law of July 16, 1925,[35] explicitly exempted bank accounts *("Bankguthaben")*. It is remarkable that American courts despite their lack of a revaluation theory, reached the same result on other grounds in the case of the vanished Confederate currency. While in general, contract debts in Confederate currency were converted at their value at the time of contracting—a rule amounting to revaluation [36]—bank deposits were converted at their value on the day of demand, which practically amounted to a refusal of revaluation.[37] "Cash", according to business usage, encompasses bank deposits.[38] The same is true of such phrases as "public moneys".[39]

Whether bank deposits, because of their money-like function, come under the monetary power of Congress is an issue not yet passed upon. The general constitutional trend in monetary matters,[40] is in favor of such a development. There exists already much indirect Federal regulation of bank deposits through legislation on national banks, through the influence of the Federal

S.C.App. 7. *American Exch. Nat. Bank* v. *Palmer*, 256 F. 680, 683 (D.C.N.Y.1919).

Strict construction has also been applied to the German Civil Code 1674, which vests in the husband authority to dispose of the "money and other consumable goods" of his wife without her consent. This has not been extended to bank deposits. Ready money and consumable goods of the wife will ordinarily be available only in very limited quantities; therefore, to stretch the rule to include bank deposits, would unnecessarily enhance the power of the husband. *Reichsgericht*, Jan. 23, 1922, *J.W.* 1922, 1443. The same applies to savings bank accounts. App. Berlin, *(Kammergericht)* Oct. 1, 1915, *Rechtsprechung der Oberlandesgerichte* XXXIV, 250.

35. *R.G.Bl.* 1925 I 117, § 66. On this question and other points of the German law on bank accounts see G. Littmann, *Das Bankguthaben (Beiträge zur Kenntnis des Rechtslebens*, ed. by the present writer, #7, 1931). The Soviet law of Dec. 14, 1947 on currency reform (tr. in *The New York Times* of Dec. 15, 1947, n. 6), Art. 8, granted limited revaluation to holders of bank deposits, but the situation is different under state capitalism.

36. *Infra*, sec. 42 III.

37. *Henry* v. *Northern Bank of Alabama*, 63 Ala. 527, at 539, 546 (1879), referring to *Planters' Bank of Tenn.* v. *Union Bank of Louisiana*, 16 Wall. (83 U.S.) 483, 21 L. Ed. 473 (1873), where the same result was reached by the application of a different theory [Confederate money as a "commodity"].

38. *Supra*, p. 21.

39. *Supra*, p. 101.

40. *Infra*, secs. 42 II, 43 I II.

Reserve System upon member banks as well as, to some extent, upon non-member banks,[41] through Federal Deposit Insurance, and through Federal emergency legislation.[42] Federal control of bank deposits might well be attained to all intents and purposes piecemeal without raising the fundamental constitutional issue.[43]

III. Bank Remittances

While the vast body of law on bank deposits in general [44] is outside the scope of the present inquiry, a few words may be added regarding the process of payment over a bank account (bank remittance) because it is primarily this process in which the monetary feature of the bank deposit comes to light.

It is generally held that payment is complete when the payee is credited on his bank account, provided he has consented or ratifies this mode of discharge.[45] A new debtor, the bank, has then

41. A remarkable instance is the successful attempt of the Federal Reserve System to eliminate charges ("exchanges") made by banks for the collection of checks drawn on them and collected through intermediate banks. Cf. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta*, 262 U.S. 643, 43 S.Ct. 649, 67 L.Ed. 1153 (1923, by Mr. Justice Brandeis), practically overriding the somewhat puzzling decision, 256 U.S. 350 (1921, by Mr. Justice Holmes; same parties). However, State enactments opposing the policy of the Federal Reserve System were held constitutional. *Farmers' and Merchants' Bank of Monroe, N. C.* v. *Federal Reserve Bank of Richmond*, 262 U.S. 649, 43 S.Ct. 651, 67 L.Ed. 1157 (1923, by Mr. Justice Brandeis). On "exchange" see *Federal Reserve Bulletin*, 1943, 817; *ibid.* 1944, 126, 339; and, at great length, Spahr, *The Clearing and Collection of Checks* (1925) 232–290. The concept is employed significantly in the Code of Commercial Law, *supra*, p. 9, n. 32, at Art. III § 105 (1) (d).

42. Such as the Freezing Order of 1941. *Infra*, sec. 31 III.

43. An opinion of the general counsel of the Federal Reserve Board, [Fed.Res.Bull. 1933, 166] asserted that Congress even had power to create a unified commercial banking system. Among the means recommended for that end he proposed, *e. g.*, forbidding State banks to receive deposits subject to withdrawal by checks, forbidding federal officers from doing business with State banks and other measures of a legally or politically questionable character. The value-regulating clause of the Constitution is out of place in this connection, *infra*, sec. 41 II. See Note "Constitutionality of exclusive Federal control over commercial banking". 43 Yale L.J. 454 (1934).

44. See, e. g., Zollman, *The Law of Banks and Banking*, (1936) Part V.

45. In *Greenzweight* v. *Title Guarantee and Trust Co.*, 1 Cal.2d 577, 36 P.2d 186 (1934), a bank had agreed to act as escrow agent with authority to cancel a trust deed on receipt of a specified sum of money. When, in the course of payment, the escrow bank had been credited with the correct amount in its account with the debtor's bank, the trust deed was cancelled. This

taken the place of the original debtor under new terms as a depositary.[46] Regarding the precise moment when payment is accomplished, English [47] and German courts [48] have advanced the theory that payment is complete once the bank has made the entry on the creditor's account rather than at the time the creditor is notified of the entry. Although under this theory an internal and revocable act of bank bookkeeping is decisive of the relations between creditor and debtor, the English-German solution seems to be preferable to others suggested.[49] The problem is not particularly important in Anglo-American countries, where bank deposits are nearly always disposed of by means of checks or other commercial paper, and not by simple remittances.[50]

was approved by the Court, the receipt of the credit being considered an adequate receipt of the money. The transferor, of course, must unconditionally have foregone control of the amount transferred, and must have so intended. See *Davis* v. *H. S. & M. W. Snyder, Inc.*, 248 Mass. 387 at 392, 143 N.E. 319 at 321 (1924). Cf. also French Commercial Code 446, par. 3; German Bankruptcy Act *(Konkursordnung)* 30 n. 2. In accord with the theory of the text are Jaeger, *Konkursordnung* I (6th ed., 1931) 589, and Drouillat, *supra*, n. 26, at 76. However, Cass., March 19, 1867, *D.P.* 1867 I 384, and App. Montpellier, March 16, 1866, *ibid.*, seem to hold to the contrary.

46. Under the theory of the French Civil Code, the bank's crediting the account of the payee by substituting itself as debtor is construed as a "novation," provided the creditor (payee) clearly has expressed his intention to release the original debtor (Civil Code 1275). However, the French courts have found means to interpret away this disturbing prerequisite in banking and even in non-banking situations. Cass., Dec. 12, 1866, *D.P.* 1867 I 433; Jan. 4, 1888, *ibid.*, 1888 I 37; Jan. 13, 1903, *ibid.*, 1903 I 122; June 10, 1913, *Sirey* 1914 I 143, and Drouillat, *supra*, n. 26, at 43.

47. *Bolton* v. *Richard*, 6 T.R. 139, 101 Eng.Rep. 477 (K.B. 1793); *Bodenham* v. *Purchas*, 2 B. & Ald. 39, 106 Eng.Rep. 281 (K.B. 1818).

48. Leading: *Reichsgericht*, April 25, 1903, *R.G.Z.* 54, 329. Ascertainment of the time of the entry may be particularly important where payment must be made within a definite time. *Reichsgericht*, March 19, 1913, *ibid.*, 82, 95, and April 21, 1926, *J.W.* 1926, 1562, where the time had been prescribed by the court.

49. For a thorough discussion of the subject matter, see Düringer-Hachenburg, *Handelsgesetzbuch* IV (1932) 914, with ample German references. French literature on transfer of bank credits *("virement")* is amazingly meager. See Lyon-Caen & Renault, *Traité de Droit Commercial* IV (5th ed., 1925) 628; Lacour et Bouteron, *Précis de Droit Commercial* (3d ed., 1925) II no. 1411. A valuable dissertation on the subject matter is offered by Drouillat, *supra*, n. 26.

50. For an explanation of this disparity, see *Encyclopedia of the Social Sciences* (1930) "Check"; Spahr, *The Clearing and Collection of Checks* (1926) 20; Kenley, *Clearing House and Credit Instruments* (1911) 207.

The differences in financial habits have their repercussions in law. In Germany and elsewhere firms, professional men, and even non-business people often indicate their bank on their stationery, in directories, *etc.* Public information of this or of a similar type amounts to a general consent to payments being made through remittances to the bank.[51] The general proposition that the consent of the creditor may be inferred from previous conduct, public or private, is, of course, also true in Anglo-American law.[52]

Section 9

THE MONETARY SYSTEM

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I. Constituents of a Monetary System

A modern monetary system is built upon an "ideal unit" as defined earlier in this volume, and upon a number of corporeal money types coordinated on the basis of this unit.[1] Whether the unit itself is actually represented by specific money is of no consequence.[2] The sovereign, equivalent to the pound, was not

51. *E. g., Reichsgericht,* Jan. 4, 1924, *Seufferts Archiv* LXXVIII 296; App. Frankfurt, Oct. 24, 1921, *J. W.* 1922, 511. In *Reichsgericht,* Oct. 25, 1892. *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* XXXVII 919, however, it has been held that the creditor is entitled to reject a payment made by remittance on his bank account. A public declaration of the creditor, implying his willingness to receive payments in this way, was not referred to in the case. Still more reserved as to the discharging effect of remittance was App. Brussels, June 28, 1922, *Revue du Droit Bancaire* I 534.

52. American courts have held that an objection by the creditor against a payment by remittance upon his account must be specific and timely. *Beranek* v. *Beranek,* 95 Neb. 311, 145 N.W. 712 (1914); *Smith* v. *Lobb,* 33 Cal.App.Rep. 790, 166 P. 1026 (1917); *Davis* v. *H. S. & M. W. Snyder, Inc.,* 248 Mass. 387, 143 N.E. 319 (1924).

1. Lack of the concept of a "monetary system" has long impaired legal inquiry into money.

   The attempt by Gutzwiller, *"Währungen als Gegenstände der Gesetzgebung", Schweizerische Juristen-Zeitung* XXXIX (1942) 157, to systematize the subjects of monetary legislation is hardly helpful.

2. See *Cramer* v. *Arthur,* 102 U.S. 612, 616, 26 L.Ed. 259 (1881).

coined until 1817.[3] It is equally unimportant whether the unit can be represented in the standard metal. Most European gold standard units, such as the franc and the mark, have always been too small in value to be coinable in gold. It is essential, however, that appropriate fractions and multiples of the unit be represented by coins or notes. In the determination of the fractions and multiples nearly all civilized countries avail themselves of the decimal system with the exception of England which has clung to the Carolingian division, 1:20:12.

While the monetary system can function only with the cooperation of society, it is itself an artificial creation of the state designed to have exclusive force within the territory. The monetary system thus acquires political significance; the basic unit becomes a national symbol in the international monetary struggle, somewhat like a national flag.[4] In the past, countries have sometimes used their own name for their monetary unit. When Belgium, on the occasion of the reconstruction of her currency in 1926, sought a name for a novel unit, she invented the name *Belga*. Similarly *Boliviano* was derived from Bolivia, *Lita* from Lithuania, *Lat* from Latvia.[5] And a popular belief interprets the symbol $ to mean U. S.[6]

The monetary system described is one at the stage of technical perfection, which has indeed been quite generally reached in recent times. However, irregular features have frequently appeared, particularly during the infancy of new systems. In establishing a new currency, the state may keep at least part of the previous currency in circulation for an intermediate period; the state may also have to regulate in terms of the basis of the new system, the use of foreign currency which for political or other reasons is still employed in payments. Former domestic coins and foreign coins may be rated in terms of the new monetary unit and thus be incorporated into the national monetary system, (a feature reminding one of the *moneta imaginaria* of the

3. Feavearyear, *The Pound Sterling* (1931) 197. To be sure, there had been a coinage of sovereigns at the end of the fifteenth century, *Feavearyear* 43. The example of the sovereign is given in the case *Cramer* v. *Arthur*, *supra*, n. 2.

4. As mentioned by Demogue, *Journal des Notaires*, 1923, 97, 101, Demogue himself rejects this characterization.

5. It may be mentioned, however, that the name *franc* for a French coin was used as early as in the 14th century. *La Grande Encyclopédie* XVII 957. See *Levy v. Cleveland, C. C. & St. L. R. Co.*, 210 App. Div. 422, 206 N.Y.S. 261 (1921).

6. The belief is erroneous, however. *Infra*, sec. 41, n. 26.

past). We then have "exogenous elements" of the system,[7] which may be "exogenous" with respect to time or to territory.

The phrase "monetary system" is used also in French terminology *(système monétaire);* the corresponding Italian phrase is *ordinamento monetario.* In Germany the expression *"Währung"* has more or less displaced the *Geldsystem;* it sometimes has other meanings, however.[8]

The concept of currency is correlative to the notion of a "monetary system". Each system will have a corresponding definite "currency". Hence, payment made in French currency means a payment made in constituents of the French monetary system.

The monetary systems as described are relatively new phenomena. They are a far cry indeed from conditions, say, of the eighth to the twelfth century, when in Central Europe practically only one silver coin, the *denarius* (penny) circulated.[9] The *moneta imaginaria* paved the way to modern monetary organization. The latter was arrived at in different countries at different times. The American monetary system was set up by the law of 1792; [10] the French one by the law of October 7, 1793.[11] In other lands the new system unfolded gradually, as in England, where the Act of 1774 [12] prescribing the recoinage of gold coins and reducing silver coins actually to subsidiary status, may be held the decisive event, unless one considers as paramount the Act of 1816, which definitely established the gold standard.[13] Still the difficulties of precise delimitation do not obviate the fact that there is a bipartition in monetary history through the advent, in the late eighteenth and the nineteenth centuries, of modern monetary systems. This caesura is significant economically; certainly it is signal in legal contemplation. In what one might call the pre-system era (the German phrase *Vorwährungszeit* is more meaningful), that is, during the later Middle

7. The term "exogenous element" suggested in the writer's *Das Geld* (1925) 45, was adopted by the *Reichsgericht,* Dec. 8, 1930, *R.G.Z.* 131, 41.

8. In the German literature of the 19th century, *Währung* ordinarily refers to irrefusable standard money, hence to gold coin in the case of a gold standard. The uncertain and fluctuating use of the word is a defect of the German literature on money. For a judicial discussion of the *Währung* concept, see App. Berlin *(Kammergericht)* Sept. 25, 1928, *J.W.* 1929, 446.

9. *Infra,* sec. 21 I.

10. *Infra,* sec. 41 III.

11. The relevant provisions of the law (of 16th Vendémiaire, Year II) are reproduced by Sédillot, *Histoire du Franc* (1939) 200.

12. 14 Geo. III, c. 42.

13. 56 Geo. III, c. 68; Feavearyear, *supra,* n. 3, at 197.

Ages and the first centuries of modern times, the elements of monetary law were utterly confused. The multitude of coining potentates, the poor coining technique, the heavy migration of coins, the ubiquity of clipping and counterfeiting, the incessant official alterations of the "intrinsic" as well as the "extrinsic" value of coins, not to speak of the calamitous intrusion of early paper money,—all these evils evoked in that formative era of capitalism a habit on the part of creditors of seeking protection through elaborate clauses inserted in contracts and other deeds—a practice sometimes followed by adverse legislative reaction. No wonder, therefore, that the law of money became the prime concern of contemporary jurists. A tremendous literature developed examining the monetary problems and clauses [14] which, despite some basic similarities, exhibited considerable local variations. With the introduction of modern monetary systems these writings lost practically all value. Even their historical significance is slight because of their local and technical character. They were soon forgotten. In the "era of systems", legal problems and litigation of a monetary type decreased strikingly. This situation changed again with the monetary troubles which followed World War I and have never ceased. Since then numerous and momentous new problems of monetary law have arisen in national and international relations. At least most of them no longer show the local and petty character peculiar to similar issues of the past.

II. Gold Standard

In the classification of monetary systems, the first question to be dealt with is that of the "standard". This refers to the metal, with whose value the basic unit, and through it the monetary system, is tied up. As is well known, the overwhelming

14. In Martinus Lipenius, *Bibliotheca Realis Juridica* (Leipzig, 1757, with *Supplementa* and *Emendationes* 1785, 1788), one finds under "*Moneta*," "*Monetae mutatio*," etc., scores of monographs more or less devoted to the interpretation of monetary stipulations. *E. g.*, Budelius, *De Monetis et Re Nummaria* (Cologne, 1591), for centuries the most famous treatise on money matters, is largely concerned with interpretative problems of this type. Earlier treatises of note are by Oresmus, *supra*, p. 34, n. 11; by Covarruvias (Covarrubias y Leyna), *Collatio Veterum Nummismatum*, in *Opera Omnia* I (1583), 271 (last two chapters; the first and larger part of the work is numismatic); and by G. A. Thesaurus, *De Augmento ac Variatione Monetarum* (Torino 1551; also *Tractatus Novus et Utilis de Augmento*, etc., used by the present writer in an edition of 1607). The brief dissertation *De Moneta Cudendae Ratione* (1526) by the famous astronomer Copernicus is a critical inquiry into contemporaneous local conditions.

majority of the national monetary systems were until World War II, and the great majority still are, tied up with the value of gold. However, it is not this somewhat loose and possibly changing interconnection which is meant when one speaks of the "gold standard" or of a "silver standard". The term refers to a situation in which the connection between the monetary unit and the metal unit is maintained by the operation of an automatic machinery. In its classical form, *i. e.*, as it was found before World War I in England, the United States, Germany, France and other countries, this automatic machinery worked about as follows: There was free import and free coinage of gold (under the orthodox theory, coinage of gold had also to be gratuitous), thereby preventing the coin value from exceeding the bullion value; gold coin could freely be melted down and exported, so the bullion value was prevented from exceeding the coin value; paper money was either refusable, or easily redeemable in gold so that the holder could be sure of a supply of gold coins at any time; and, of course, gold coin was legal tender.

The adoption of this standard by leading countries resulted in the establishment of a fairly uniform gold price the world over. Differences of gold price among the various gold standard countries—caused by the cost of shipping and insurance—remained within the narrow bounds indicated by the "gold points". The spread between London and New York, for instance, was ordinarily ½ per cent and in the case of greater distances not much more than 1 per cent.[15]

That classical gold standard no longer exists. It was first replaced by the "gold bullion standard" of which the English Gold Standard Act, 1925,[16] is typical. While that Act abrogated the redeemability of the individual notes of the Bank of England, it obligated the Bank to sell bars of gold of 400 ounces troy for legal tender, that is, for notes of the Bank (£1700 being approximately the equivalent of 400 ounces). This standard, proposed by David Ricardo as early as 1816,[17] put an end to the abundant circulation of gold coin, made bank notes the principal medium of exchange, and at the same time maintained the essential feature of the gold standard, inasmuch as it embodied in the notes the

15. Hawtrey, *The Gold Standard* (1939) 40.

16. 15 & 16 Geo. V, c. 29, sec. 1. The practice under the French law of June 25, 1928, *D. P.* 1928 IV 313 at 317, tr. *Federal Reserve Bulletin* 1928, 570, was similar. The minimum amount for the purchase of gold bullion was fixed at 215,000 francs. *Handbook of Foreign Currencies* (Dept. of Commerce, 1936) 84.

17. In his booklet, *Proposals for an Economic and Secure Currency.*

holder's right to gold—more specifically, a statutory option for the holder to buy gold bars from the central bank under the condition that he would offer a sufficient quantity of notes. There was still "convertibility", though no longer "redeemability".

A step further away from the true gold standard was the so-called gold exchange standard. Under the latter, the holder of local currency was still entitled to have his money exchanged in minimum amounts fixed by statute, not for gold metal, as in the case of the gold bullion standard, but for drafts on gold standard countries, calling for payment in gold standard currency. This system which, under American administration, was used in the Philippines until 1910 [18] still afforded to the moneyed individual independence from monetary policies of the local government, but it involved financial, if not political subordination of the local government to that of the gold standard country.

Under pressure of the world monetary crisis, they have practically all disappeared—gold standard, gold bullion standard, and gold exchange standard. Currency has become "managed", viz., by the government. Gone is the proud feeling (or delusion) of the moneyed individual of the past that he can lock himself in a fortress of gold sheltered against the economic and political troubles of the outside world. The end of the gold standard therefore means the end of economic liberalism or rather of its older individualistic type. Gone also is the automatism which kept together the monetary unit and the standard metal.

Still the goal of stabilization has remained and its principal means is still the correlation of money value and gold value. After the breakdown of automatism the only way left was the regulation of the price of the standard metal through government controlled purchase and sale of gold for national money. Juridically this would appear at first to be no more than a matter of

18. The Act Constituting a Gold-Standard Fund in the Insular Treasury, of October 10, 1903, 3 *Public Laws, passed by the Philippine Commission* (1905) 88, § 7, authorized and directed the Insular Treasurer "to exchange on demand . . . for Philippine currency offered in sums of not less than ten thousand pesos . . . drafts on the gold-standard fund or elsewhere to the credit of the Insular Treasury" [provisions follow regarding charges] . . . See Kemmerer, *Money* (1931) 155. Again, under the German Bank Act of August 30, 1924, *R. G. Bl.* 1924 II 235, § 31, the *Reichsbank* was required to redeem its notes in gold coin, in gold bullion or in drafts on foreign countries, the choice resting with the bank. This practically resulted in a gold-exchange standard and, later on, in another cessation of redemption, when in July, 1931, transactions in foreign exchange and gold were made dependent upon governmental license.

administration, leaving the government discretion in the choice of the gold price, or rather discretion in utilizing, in the interest of the country, the opportunities afforded by general conditions of the gold market. However, legislation may restrict or exclude the discretion of the administrative (or executive) branch of the government by prescribing the price to be observed in the sale and purchase of gold. As was pointed out earlier in this volume, legislative fixation of the monetary unit in terms of gold implies such a restriction of the power of the administrative branch. Sometimes the legislature contents itself with prescribing a maximum and a minimum gold price to be paid by or to the government.[19] In either case, the monetary unit is still linked to *gold by law.* (The point is meaningless in the case of a totalitarian regime.) In this sense a kind of gold standard still persists which one might call a "gold management standard" [20] inasmuch as the standard is set for acts of management—namely, for purchases and sales of gold.

The government's financial capacity to carry out the legislative policy will be strengthened through the establishment of a "stabilization" or "equalization" fund or account.[21] Equalization is the official English term and its more reserved connotation indicates that its aim is rather to check fluctuations of a speculative nature than to counteract natural movements of the market. External conditions, we repeat, may be stronger than the government which, nevertheless, must do its best to restore the situation envisaged by the legislature. But this is all that the statutory gold management standard implies. The fact that a definite ratio between the monetary unit and gold stands still unamended in the statute books is no acceptable basis for ascertaining the "value" of the unit.[22]

In this country, the power to determine the gold parity of the dollar rests with Congress which in 1933 delegated to the Presi-

19. This is the Swiss system. Swiss decree of September 27, 1936, *Eidgenössische Gestzsammlung* 1936, 741, tr. *Federal Reserve Bulletin* 1936, 880 [limits for the franc set between 190 and 215 milligrams of fine gold, in the discretion of the Federal Council]. The French law of October 1, 1936, *D. P.* 1936 IV 393, tr. *Federal Reserve Bulletin* 1936, 878, Art. 2 [reduction of the franc value to 43–49 milligrams of gold by the Cabinet], was amended by decree of June 30, 1937, *D. P.* 1937 IV 138, tr. *Federal Reserve Bulletin* 1937, 720, giving the Government full discretion in the management of the franc.

20. A phrase, such as "managed gold standard" would not convey the idea that the standard is set for the *management* by law.

21. *Infra*, sec. 35 III.

22. *Infra*, sec. 13 II.

dent power to fix that parity between fifty and sixty per cent of the original value.[23] When the President, by his Proclamation of January 31, 1934, reduced that parity to 59.06 per cent,[24] he retained power to decree a further reduction of 9.06 per cent. That power expired in 1943.[25] As a result a strange controversy has arisen. Under a rule stemming from Civil War times the Secretary of the Treasury has power to purchase and sell gold "as he may see most advantageous to the public interest." [26] It has been asserted that under this rule the Secretary has power to buy and sell gold above or below $35 an ounce as prescribed by the Presidential Proclamation which has the force of a law.[27] Since "parity" means nothing but the buying and selling price of gold, the Secretary of the Treasury, under that theory, would be entitled to devalue or revalue the dollar without any limitation, provided only that he considers the measure "as most advantageous to the public interest." Consequently, he would long have had a truly gigantic power—a power far surpassing the one which, under the pressure of emergency, Congress in 1934 delegated to the President, reenacted three times and finally let expire in 1943. One wonders why Congress should have taken so much trouble in this matter if the Secretary of the Treasury possessed that power. In fact, the statutory ratio of $35 = 1 oz. of fine gold would be perfectly meaningless under such an interpretation. Evidently the latter cannot be maintained. The Secretary's power is subordinate to the statutory parity.[28] This

23. Agricultural Adjustment Act of 1933, § 43(b) (2), as amended, 31 U.S.C. 821(b) (2), *infra*, sec. 43 II.

24. Proclamation No. 2072, 48 Stat. 1730, 31 U.S.C. 821, note.

25. The latest (third) renewal of the Presidential power was enacted for two years by the Act of June 30, 1941, 55 Stat. 396.

26. Regarding purchase, Act of March 17, 1862, § 1, 12 Stat. 370, as amended by the Gold Reserve Act of Jan. 30, 1934, 48 Stat. 341, § 8, 31 U.S.C. 734; regarding sale, Res. No. 20 of March 17, 1864, 13 Stat. 404, as amended by the Gold Reserve Act § 9, 31 U.S.C. 733. Before 1934 the provisions referred to coins only.

27. The material has been carefully presented in a Note, "Power of the Executive to change the gold value of the dollar," 48 Col.L.Rev. 410 (1948). In August–September, 1947 the issue was much discussed in the dailies. See *e. g.*, *New York Times*, Aug. 17, 1947, p. 1. Cf. also Treasury statement of Oct., 1949, in *Monetary Notes* (ed. by Spahr) of Nov. 1, 1949, p. 2.

28. The Gold Reserve Act (*supra*, n. 26) § 8 gives the Secretary the power to purchase gold, "any provision of law relating to the maintenance of parity . . . to the contrary notwithstanding." This phrase is ambiguous. It does not necessarily mean, as assumed in the Note, supra, n. 27, at 415, that the Secretary need not bother about statutory parity at all. § 9 of the Act, (31 U.S.C. 733) giving the Secretary power to *sell* gold, is clearer. It

construction does not negate the statutory powers of the Secretary, because he may, in special situations, buy and sell gold above and below parity wherever this can be done without jeopardy to the general market price of the dollar.

To the problems discussed the establishment of the International Monetary Fund has added issues of an international character. The Fund has instituted for the monetary units of the member states "par values" on a gold basis which a member must not alter without the Fund's consent.[29] Hence, the Fund has created *international* gold management standards. In the case of the United States the gold management standard has become one of national as well as of international law.

III. Other Monetary Standards

The silver standard is structurally like the gold standard but has actually nowhere attained the latter's technical perfection. Historically it is associated with less advanced economic systems—in China it existed until 1935—and it has frequently been a precursor of the gold standard. The transition sometimes gave rise to intriguing legal questions,[30] but otherwise the silver standard, as such, has juridically remained indifferent.

Paper currency (*Papierwährung*) means merely a currency consisting of paper media except for minor coins and perhaps substandard silver coins. Paper currency is not confined to the case of currency "management". Gold bullion and gold exchange standard go with paper currency and even in the case of a real gold standard, gold coin circulation may run thin because of the preponderance of ("redeemable") paper money. The term "paper currency" has therefore no technical significance. In any case it is inadvisable to speak of a "paper standard" or "paper money standard" as is sometimes done.[31]

obligates him to sell gold which is required to be maintained as a reserve or as security for currency issued by the United States, "only to the extent necessary to maintain such currency at a parity with the gold dollar." The Secretary's subordination to the statutory parity is here distinctly expressed. The same view must be applied to § 8, since it would be preposterous to have one rule for purchases of gold and another for sales. See also next note.

29. More on this *infra*, sec. 38 I. The Bretton Woods Agreements Act of July 31, 1945, 59 Stat. 512, 22 U.S.C. 286(c), requires the assent of Congress for a vote of the American representatives in favor of an alteration of the dollar parity. This rule evidently corroborates the view taken in the text.

30. *Infra*, p. 126.

31. The "tabular standard" is not a standard of "money." *Supra*, p. 29.

Plans for contriving a non-metallic standard have long been a favorite occupation of money inventors. Soil, labor and "national wealth" have been preeminently recommended as standards of money. There is a good deal of quackery in these schemes. Some have made their appearance in the province of the law. The French *assignats* and *mandats territoriaux* both based on the vast fiscal possessions of the government are the most notorious instances. Of more recent date is the "Alberta Social Credit Legislation" of 1936 and 1937 which purported to create novel circulating media to be based on the "production capacity of the people of Alberta", each Albertian being entitled to a monthly "consumers dividend". This astounding legislation was invalidated by the courts as unconstitutional.[32] The German *rentenmark,* whose issuance in 1923 brought to an end the great inflation was based on mortgages in German agricultural real estate and industrial bonds.[33] But contrary to the original proposal of Helfferich, well-known monetary expert, member of the Cabinet and leader of the Nationalist (*deutsch-nationale*) Party, the mortgages and bonds were not couched in terms of a *Roggenmark* ("ryemark")—which would have fluctuated with rye prices —but of a "goldmark", that is, of a mark linked to a definite quantity of gold.[34] The tie of the rentenmark to the soil was therefore pretty loose. There is little doubt that the use of the ryemark would have resulted in failure.

A currency foregoing any broader international use may do away with a standard entirely as is shown by the example of Soviet currency.[35]

IV. Operation of the Standard upon Fiduciary Constituents

If a monetary system through automatism or management, is connected with gold—that is, wherever the value of the unit is

32. *Reference re Alberta Statutes. The Bank Taxation Act; the Credit of Alberta Regulation Act; and the Accurate News and Information Act* [1938] S.C.R. 100 (Sup. Court of Canada, 1938), *aff'd*, [1938] 3 Western Weekly Rep. 337 (Pr. C.). On the "thoroughly crankish" theory behind the scheme see A. Hart, *Money, Debt and Economic Activity* (1948) 440.

33. Schacht, *The Stabilization of the Mark* (1926); Baumgartner, *Le Rentenmark* (Paris, 1925). See also, *infra*, p. 201.

34. Schacht, 83. On the actual experiences with "rye bonds" *infra*, sec. 20 I. The reference to rye was very popular with Helfferich's party, dominated as it was by the great landowners. The politician in Helfferich had won the upper hand over the monetary expert.

35. See Hubbard, *Soviet Money and Finance* (1936) 131. The existing relation of gold with the ruble is nominal only.

regulated on a gold basis—it will not be sufficient to keep the value of the gold coins, if any, in the desired equilibrium with gold. Provision must be made that the value of the fiduciary constituents of the system conforms with their respective arithmetical relationship to the basic unit. Generally speaking, it is the purpose of monetary legislation and policy not only to regulate the value of the basic unit, but also to uphold the legally prescribed relations of value between the constituents of the system, irrespective of their "intrinsic" value. It is for this reason that the law of the United States, after having made the dollar, consisting of 25 8/10 (now 15 5/21) grains of gold 9/10ths fine, "the standard unit of value", goes on to say that "all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity".[36] The surprising extension of a gold value to silver, copper, nickel and paper can be achieved without difficulty if the non-standard money is kept circulating in quantities not greater than necessary to satisfy the demands of the community. Also, there must be no free coinage of the metals used for minor coins. Upon this condition, non-standard coins, such as silver coins under a gold standard rule, may even be made unlimited legal tender. The fact that the creditor can be compelled to receive silver coin of any amount in discharge of the debt might be considered a flaw in the gold standard, and the term "limping gold standard" has commonly been used to describe this situation. However, the famous examples of the American silver dollar, the French 5-franc piece[37] and the Prussian thaler under the mark currency[38] have shown that the tie-up of the basic unit with a gold value need not be impaired by the unlimited, and even permanent, legal tender quality of silver coin.[39]

36. 31 Stat. 45, § 1, 31 U.S.C. 314. See *infra*, n. 49.

37. Arnauné, *La Monnaie, Le Crédit et le Change* (4th ed., 1909) 211.

38. *Infra*, p. 126.

39. The operation of the standard was also illustrated by the development of the East Indian currency. In 1893, when East India was on a silver basis, with the rupee as the monetary unit, the Government discontinued free coinage of silver. The ensuing relative scarcity of silver coins and the conviction that the rupee ultimately would be converted into gold resulted in a progressive improvement of the rupee value in terms of gold, despite the steady fall of the silver market. In 1899, a "limping" gold standard was introduced in East India. Much has been written on these events. See, e. g., Keynes, *Indian Currency and Finance* (1913); Laughlin, *Money, Credit and Prices* I (1932), 327; Dadachanij, *History of Indian Currency* (1927). In *U. S. v. Lucius Beebe & Sons*, 122 F. 762 (C.C.A.1st, 1903), a customs case,

The operation of the monetary system upon its non-standard constituents was illustrated in the "Austrian Coupon Cases." From 1860 to 1870, Austrian railroad companies had issued multiple currency bonds, calling for payment in Austrian florins or Prussian thalers, as the bond or coupon was collected in Austria or Prussia. The Austrian florin and Prussian thaler, each representative of the monetary unit of the country of its origin, were silver coins, the Austrian and Prussian monetary systems being on silver. When Germany, in the seventies, adopted the gold standard through the establishment of the mark currency, it incorporated the Prussian thaler coins into its new system (as an "exogenous" element) in the ratio of one thaler to three marks. Thalers, of course, could no longer be coined. Shortly afterwards the silver market began to decline, partly as a result of the abandonment of the silver standard by Germany. When the coupon holders sought to collect marks in Prussia at the legal ratio of three marks to one thaler, the railroad companies objected. They were, however, willing to pay in florins, or the *metallic* value equivalent in marks of as many silver thalers as the coupons called for. The cases, undoubtedly the most famous in the legal monetary history of the central European countries, were passed upon by a number of German and Austrian courts,[40] among them the German *Reichsoberhandelsgericht* [41] (Supreme Commercial Court) and the *Reichsgericht*,[42] which succeeded the former in 1879. The opinions of the *Reichsoberhandelsgericht* both generally and in respect to the Austrian coupon suits, were outstanding for their juridical excellence. One of the points involved was whether the Austrian companies were bound by the German law which transformed the Prussian silver system into the German gold system. German law being applicable under

the court did not succeed in coping with the rupee problem.

40. The cases are collected in *Zeitschrift für das Gesamte Handelsrecht* XXVII (1882) 512. The German courts held for the plaintiffs, the Austrian courts for the defendant railroads. Discussion of the Austrian Coupon Cases, in which problems of international law were also involved (*infra*), sec. 24 V was extensive and resulted in monographs of established value: E. J. Becker, *Über die Couponprozesse der Österreichischen Eisenbahngesellschaften* (1881); Gustav Hartmann, *Internationale Geldschulden* (1882). For other citations, consult Hasenoehrl, *Oesterreichisches Obligationenrecht* I (2d ed., 1892) 262, n. 38.

41. Judgments of February 19, 1878, *Entscheidungen des Reichsoberhandelsgerichts* XXIII 205 and April 8, 1879, *ibid.* XXV 41.

42. Judgments of Dec. 12, 1879, *Zeitschrift für das Gesamte Handelsrecht* XXVII 537; of March 1, 1882, *R.G.Z.* 6, 125; of February 9, 1887, *ibid.* 19, 47.

the rules of private international law,[43] the further question arose whether the position taken by the railroad companies was supported by the fact that the thalers, under the transitory provisions of the German monetary Act, had remained unlimited legal tender at the ratio of one thaler to three marks. This was denied by the *Reichsoberhandelsgericht*. Said the Court: [44]

> "The Appellate Court has overlooked the true significance of that fact [the discontinuance of coining silver thalers] with respect to those old silver coins which are still circulating. In truth, there has been brought about . . . the rejection of a double standard for the period of transition. . . . For, owing to the discontinuance of their issue and their gradual withdrawal, those silver coins of old which are still circulating, are not available to debtors, as their choice or need may demand. When, on the market, the ratio between gold and silver changes from the one established by law, debtors are no longer able to buy cheaper silver in order to have it coined for their own account and thus to pay merely the actual value of silver in newly coined silver money. By the provision that thalers must be accepted in payment the same as other money of the Empire at the invariable ratio of three marks, regardless of the actual relation of gold and silver, the thaler has obtained an invariable gold value. This means that the price of the thaler exceeds its actual value insofar as silver drops below the legally established ratio to gold. Those, then, who have to pay in Germany silver debts contracted prior to the new German monetary laws, may still pay them in silver *thalers*, but such *thalers* have now become a fixed equivalent of German gold currency. The debtor who pays in thalers gives away gold value as legally fixed and, owing to the constant fall of silver, in excess of silver value, without being able to compensate the loss by purchasing silver and having it coined for himself. Unquestionably, therefore,

43. *Infra*, sec. 24 V.

44. Judgment of April 8, 1879, *Entscheidungen des Reichsoberhandelsgerichts* XXV 41. The case *U. S. v. Lucius Beebe, supra*, n. 39, deals with an analogous problem.

More recently Cass., April 4, 1938, *Sirey* 1938 I 188 proceeded along lines similar to the German courts. The court was concerned with debts of Indo-Chinese (silver) trade piasters which in 1930 were incorporated, as "exogenous elements", into a new Indo-Chinese piaster currency. The latter was based on gold, but depreciated after the abandonment of the gold standard. The court deemed the silver value of the trade piaster irrelevant in the determination of the debt which, although incurred before 1930, was considered to have become an ordinary and depreciated piaster debt.

the legal value of the thaler, as far as it is still legal tender in Germany, has been changed by the establishment of the gold standard and the thaler has become an order (*Anweisung*) for gold currency." [45]

While the immediate problems involved have lost their actual significance, the language of the Court remains illuminating for monetary theory.

V. Bimetallism—Dual Systems

A currency is bimetallistic where the ideal unit is defined in terms of gold as well as of silver on the basis of a fixed gold-silver ratio. To refer to the most famous examples, the American law of 1792, creating the dollar currency, adopted the ratio 15:1,[46] whereas the French law of 17 Germinal Year XI (March 28, 1803) [47] decided that it should be 15½:1. As has long been recognized, disparity between the metal market and the legal ratio is bound to bring about serious disturbances in the operation of a bimetallistic system.[48] The standard metal which in the market is valued at a rate higher than the legal ratio, will be exported or hoarded in accordance with Gresham's law that "bad money drives out good money". Since the relative valuation of gold and silver may change in the market, the double standard means, as a matter of economic fact, a single alternating standard. Regardless of the legislative coordination of the two metals, the cheaper one will determine the kind of circulating media and the international valuation of the monetary unit. The law is powerless in this respect.

Bimetallism as a legal system has disappeared since the seventies owing to the depreciation of silver. However, in the realm of thought it has survived the evanescence of its material basis. It has also tinged and distorted American legislation. When the gold standard gradually forced itself upon the country, and con-

45. A German law of 1920, prohibiting the trading at a premium in "existing and former silver coins of the Reich," was held not to apply to the thalers, App. Dresden, Dec. 20, 1922, *Leipziger Zeitschrift für Deutsches Recht*, 1923, 149. The court, less perspicacious than the *Reichsoberhandelsgericht*, did not see that the Prussian thalers, through incorporation in the monetary system of the Reich, had become silver coins of the Reich.

46. Act of April 2, 1792, 1 Stat. 246 at 248, § 11, *infra*, sec. 41 III.

47. Duvergier, *Collection des Lois* XIV 176; cf. Arnauné, *La Monnaie, le Crédit et le Change* (4th ed., 1909) 189.

48. See, *e. g.*, Giffen, *The Case against Bimetallism* (4th ed., 1896); Laughlin, *The History of Bimetallism* (1898).

formable legislation was enacted, the powerful silver party had to be placated. Some harmless generalities of bimetallistic flavor still adorn the United States Code.[49] The monetary-value theory for silver bullion is less innocuous.[50]

Bimetallism relates to a double basis of a *single* monetary system. From this pattern the "dual" or "parallel" currency must be distinguished. Such a phenomenon is found where, in the same territory, two unrelated currencies circulate side by side. Thus, before the American Revolution both "current lawful money" and "tobacco currency" circulated in certain southern colonies.[51] During the Revolutionary War there were the Continental dollars and the colonial pounds.[52] A dual currency may also emerge through disintegration of a single system. The classical instance is the greenback period when paper dollars and gold dollars served as media of exchange while the former fluctuated in the market of gold and foreign exchange.[53]

Distinctive terminology is desirable. "Dual currency" seems preferable to "dual standard" [54] as exemplified by the Civil War

49. 31 U.S.C. 311, (from the Act of Nov. 1, 1893, 28 Stat. 4) "It is hereby declared to be the policy of the United States to continue the use of both gold and silver as standard money and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. And it is hereby further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts." These pronouncements were still considered "the general policy of the United States as to bimetallism" in 37 Op.Att.Gen. 344 (1933). "International monetary conference commissioners" are provided by 31 U.S.C. 312 (Act of March 3, 1897, § 1, 29 Stat. 624); and 31 U.S.C. 313 (Act of March 14, 1900, § 14, 31 Stat. 49) envisages co-operation "for the accomplishment of international bimetallism." There is bimetallistic ambivalence in the provision quoted, *supra*, at n. 36.

50. *Supra*, p. 70.

51. *Infra*, sec. 40 V.

52. *Infra*, sec. 41 I.

53. *Infra*, sec. 42 I. See furthermore, Kemmerer, *Money* (1935) 96, concerning conditions in Guatemala where, after World War I, local paper currency and American money were used simultaneously. Cf. also Mood, *Handbook of Foreign Currency and Exchange* (1930) 112, on Mexican currency after World War I.

54. Helfferich, *Money* (tr. by Infield, 1927) 54. In the German original (*Das Geld* [2d ed., 1923], p. 53) he speaks of *Parallelwährung* in contrast to *Doppelwährung*.

situation where the greenbacks were drifting with no standard. However, the term "parallel currency" is more commendable than "dual currency," because the words "dual" or "double" are also applied to bimetallistic systems. Unfortunately further confusion has been created by the Joint Resolution of June 5, 1933, which abrogated gold clauses.[55] It repeats the stock phrase that "the equal power of every dollar" "ought to be maintained in the markets and the payment of debts." Yet at that time gold dollars no longer circulated, having been requisitioned by the Government. Only paper money, silver coins and minor coins were left. Their "parity" evidently was neither contemplated by the Joint Resolution nor was it in any way imperiled. What the Joint Resolution really meant was that debtors who had undertaken engagements in terms of gold dollars should not be obligated to pay in the available currency more than the nominal amount of their debt. Gold clause or not, the dollar debtors should all be on the same footing. The "parity" phrase tried to link the Act to inveterate tradition but was out of place and proved misleading. As a result, courts employed "dual monetary system" language in order to explain the objective of the Joint Resolution.[56] In reality, no dualism of monetary systems was involved.

From bimetallism and parallel currency one must further distinguish those situations where, abreast of the real currency based on an ideal unit, a "unit of account" (gold unit) is officially recognized. Such was the case from 1899 to 1914 and again from 1927 to 1929 under the Argentinian system of the *Caja de Conversión* (Conversion Office) when only paper pesos circulated while for the needs of foreign trade a "gold peso" was admitted as a unit of account.[57] The connection of the gold pesos with the currency was established by the fact that the Conversion Office would deliver gold in return for paper pesos of a certain minimum amount. Again, under the sway of exchange control, governments buy from and sell to their nationals, scarce currencies such as the dollar, at different prices in order to regulate imports and exports. In such and similar cases one speaks of "multiple currency practices," [58] but the multiplicity exists there only with respect to ratings, not to currencies. The legal structure of the monetary system is neither affected by the formation of units of accounts nor by multiple rating of foreign currencies.

55. 48 Stat. 112; *infra*, sec. 19 I.

56. *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240 at 316, 55 S.Ct. 407, 79 L.Ed. 885 (1935); *Compañía De Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland*, 269 N.Y. 22 at 27, 31, 199 N.E. 691 (1935).

57. *Infra*, sec. 13 III.

58. More on this *infra*, sec. 33 III.

VI. Changes Within and Without the Monetary System

All monetary systems, as constituents of a working economy, are constantly changing in many ways. Even during periods of quiet, new types of coins or of paper money may be introduced; others may be called in and invalidated; the quality of legal tender, or public receivability may be bestowed upon, or taken away from, or be limited with respect to, certain constituents of the system; regulations concerning reserves for the redemption of paper money may be changed. Despite these and other modifications, the continuity of the monetary system is not in question; the innovations do not break up the framework of the system.

On the other hand, there are many instances of major changes resulting in discontinuance of a monetary system. This happens particularly when, as the outcome of war or revolution, a new sovereign is established in the country.[59] A victorious power, acquiring the territory of a defeated enemy, will introduce its own monetary system or at least an ancillary system.[60] Again, the foundation of a national government will lead to the substitution of a national monetary system for the former local currencies. This happened in the United States in 1792 and in Germany when the latter, after the establishment of the German Empire in 1871, constructed a national monetary system based on gold with the *mark* as the unit, abrogating the silver systems of the several states, such as the Prussian *thaler* currency.

In case a new monetary system is created, there will normally be two sets of regulations for the transition from one system to the other. First, provision must be made for coins and paper money of the old system. They may be exchanged, at a definite ratio, for new money;[61] they may be incorporated, as "exoge-

59. A peculiar situation arose after World War I in Polish Upper Silesia, where, through a German-Polish ("Geneva") Convention of May 15, 1922, art. 306ff., maintenance of the German monetary system was agreed upon for a number of years, a regulation which broke down in 1923, owing to the collapse of the German mark. Cf. Kaeckenbeck, *The International Experiment of Upper Silesia* (1942) 451, 692. Generally, see Nolde, "La Monnaie en droit international public" *Rec. Ac.* XXVII (1929) 285.

60. The existence and validity of the new currency is entirely independent of whether or not the new sovereign is to be considered as the "successor" of the former sovereign. The two questions have been confused by App. Berlin (*Kammergericht*), Dec. 20, 1922, *J.W.* 1923, 189, *aff'd* by the *Reichsgericht*, Sept. 19, 1923, *R.G.Z.* 107, 121.

61. For the exchange rule adopted on the introduction of the French monetary system into Morocco, see Cass., April 23, 1923, *J.D.Int.* 1924, 441. An instance may also be found in the Austrian legislation of 1811 reconstructing the Austrian currency. Hargreaves, *Restoring Currency Standards* (1926) 77 (at bottom

nous" constituents, into the new system; or they may be abandoned. Furthermore, there are ordinarily conversion rules providing for the payment in the new currency of debts contracted in terms of the abrogated system. Thus under the German coinage Act of 1873, a *thaler* debt was to be discharged according to the ratio of one *thaler* to three *marks*.[62] Where the superseded unit has undergone a process of gradual depreciation, the conversion rule will possibly scale the conversion ratio according to the time of contracting.[63]

But how to chart the boundary line between a mere modification of a given monetary system and its replacement by a new system? [64] This question was put squarely before high courts at least twice—first in *Adelaide Electric Supply Co. Ltd.* v. *Prudential Insurance Co.*[65] In this case the House of Lords had to decide whether dividends of the Adelaide Company stipulated in terms of "pounds" referred to English or to Australian pounds, the latter having depreciated and being tendered by the Company. The court, unanimous in favor of the Australian Company, split on the applicable theory. While Lord Atkins and Lord Wright regarded the English and Australian pounds as separate units, Lord Warrington of Clyffe, Lord Tomlin and Lord Russel of Killowen proceeded upon the theory that the units were still the same, but that payment effecting a discharge could be made in Australian currency, the place of performance being Australia. At the present phase of our discussion [66] we are solely concerned with the question whether at the time of the decision a "new" currency had been born in Australia. This was denied by the majority on the ground that there had never been, either in the United Kingdom or in Australia, any "act in the law having the force of statute expressly separating the money of account of the United Kingdom from the money of account of Australia or creating a distinct monetary unit." [67] The state theory of money which here appears

sub 2). For further examples see the writer's *Das Geld* (1925) 49, n. 1.

This type of exchanging specific money is akin to the compulsory exchange practised in past centuries when money was "decried." *Supra*, p. 33.

62. *Supra*, p. 126.

63. *Infra*, sec. 14 I.

64. In addition to the next following cases, the distinction between changes of and within a monetary system is used in *Parker* v. *Hoppe*, 258 N.Y. 365 at 370, 170 N.E. 770 at 772 (1932).

65. [1934] A.C. 122 (H. of L., 1933).

66. On the private-international-law aspects of the case, *infra*, sec. 26, n. 4.

67. See the opinion of Lord Tomlin, [1934] A.C. 143. Mann, though follower of the State Theory of money apparently disagrees with

is contrary to English tradition,[68] and especially unconvincing in this application. The separation of the Australian pound from the English was started by the Australian Coinage Act of 1909 and subsequent Australian statutes; [69] it could not be demonstrated more impressively than by the different evaluation of the two pounds in the market of foreign exchange.[70] The differentiation by the financial community clearly evidences that a split had occurred. Actually the independence of the Australian currency was recognized in other cases, English and Australian.[71] Today the distinctive character of the two currencies can no longer be questioned though there has never been a declaration of monetary independence on the part of Australia.

Generally speaking a separation of currency is an aspect of evolution toward political independence. The same thing happened in the American colonies when, through various local developments, colonial pounds sprang from the pound sterling which the early settlers had brought with them.[72] There, too, divorce of currencies was indicated by the depreciation of the colonial pounds in terms of English pounds.

A complete dismemberment of a monetary system occurred in Europe after the breakdown of the Austrian Empire in 1918. The successor states at once proceeded to stamp the imperial crown

Lord Tomlin. *The Legal Aspect of money* (1938) 44.

68. *Supra*, p. 7.

69. See case in n. 65, at 143, 144.

70. The Swiss Federal Tribunal, June 27, 1918, *Amtliche Sammlung* 44 II 213, refers to the rate of exchange between the French and the Swiss franc in order to demonstrate the diversity existing between the two monetary systems.

71. See *Broken Hill Proprietary Co.* v. *Latham*, [1933] Ch. 393 (C.A., 1932), and on the Australian side, *In re Tillam Boehme & Tickle Pty. Ltd.*, [1932] Vict. L.R. 146, the carefully documented taxation case *Payne* v. *Federal Commissioner of Taxation*, 51 C.L.R. 197 (High Court of Australia, 1934), *aff'd* [1936] A.C. 497 (Pr.C. 1936) [premium of English over Australian pound taxable in Australia] and *Colonial Ammunition Co., Ltd.* v. *The King*, [1937] N.Z.L.R. 946 (Sup. Ct. of N. Z., 1937). There the defendant, a New Zealand corporation, sold ammunition to the New Zealand government, at a price "equal" to the current prices paid by the War Office in England. Held that the price was New Zealand pounds "equal" to the number of English pounds paid by the War Office (the latter were at a premium of 25%). The puzzling decision was reversed by the Court of Appeal, Wellington, [1938] N.Z. L.R. 354, which held that the premium was to be taken into account in the determination of the price.

In Australian usage, the difference between the sterling and the Australian pound is frequently called "exchange". See, *e. g.*, *Thompson* v. *Wylie*, 12 *Australian Law Journal* 120 (N.S.W., 1938).

72. *Infra*, sec. 40 V.

notes circulating within their territories, at the same time closing their frontiers against the influx of other crown notes.[73] Hence, new national currency units (Austrian, Hungarian, and Czechoslovakian crowns) with corresponding systems came into existence. Again the rise of new ideal units was made very clear from their immediate disjunction in the market of foreign exchange.

In a different setting the identity problem was presented to the *Reichsgericht* in a case decided on October 13, 1933.[74] On May 21, 1931, the *Reichsbank* had bought from the plaintiff a bill of exchange drawn on Mexico City in the amount of 100,000 Mexican gold pesos maturing August 15, 1931. The contract contained the following proviso: "In case bills of exchange . . . are not paid in the currency in which they are couched the *Reichsbank* may charge the customer additionally with the rate of exchange differences if any." On July 27, 1931, a Mexican law was enacted demonetizing Mexican gold coins and providing that all debts contracted for in terms of Mexican pesos, no matter of what kind, should be discharged by payment of silver and other non-gold coins.[75] The drawee of the bill of exchange took advantage of the new law, and the *Reichsbank* suffered a loss of about $30,000 (in terms of the present dollar value) for which it debited the plaintiff. This debit was disallowed by the *Reichsgericht*. It interpreted the proviso as bearing upon a situation where, owing to the establishment of a new monetary system, payment was made in a currency other than the stipulated one.[76] So the question appeared whether a "new" currency had been created in Mexico. The Court considered the decisive criterion to be whether or not the monetary system was "entirely destroyed", and this had not happened in 1931 to the Mexican currency despite its depreciation.

73. The pertinent ordinances of the various countries are collected by Fr. Steiner, *Die Währungsgesetzgebung der Successionsstaaten Österreich-Ungarns*" (1921), particularly at 132, 198, 596.

74. *R.G.Z.* 142, 23.

75. *Diario Official de Mexico*, July 27, 1931, n. 23. By a simultaneous amendment of the Banking law, *ibid.*, the Bank of Mexico was relieved from the obligation to redeem its notes in gold, but the notes were not made legal tender. Actually, so small an amount of the notes was outstanding that in spite of the law, redemption in gold was made by the bank. *New York Times*, April 4, 1938, Financial Section, p. 1.

76. This interpretation seems questionable. The proviso presumably referred exclusively to bills of exchange running in terms of a currency other than the currency of the place of payment. In such a case under the majority of the bill-of-exchange laws, payment may be made in the local currency. See *infra*, sec. 25 I. The *Reichsgericht* admitted this interpretation as an alternative.

Judgment, therefore, went to the plaintiff. The fact that under the 1931 law, the unit of the Mexican system preserved its former name *(peso)*, the court pointed out in a dictum, would not have excluded the possibility that a new monetary system had come into existence.

At the bottom of this argument one finds a concept of monetary destruction or "ruination" which the court had developed under the impact of the great inflation of 1918-1923.[77] Whatever the merits of this doctrine, there is little strength in the argument that in 1931 the Mexican peso had remained the same merely because the unit had not been entirely destroyed. A new unit may be introduced without "destruction" of its predecessor. Nevertheless, it is believed, the adjudication was right for other reasons. The Mexican law of 1931 not only retained the name of peso, but upheld its old gold ratio as a "management standard". The substance of the Mexican monetary law remained unchanged at that time.

The broad problem of "identity or newness" which presents itself at this juncture can be decided here as elsewhere only through a judicious appraisal of the circumstances attending each individual situation.[78] The vagueness of this advice is largely remedied by some implementary considerations. Negatively one must keep in mind that alterations of the value of a monetary unit are in themselves not sufficient to warrant the hypothesis that a new unit, and therefore a new monetary system, has come into existence. As was seen, independence from fluctuating valuations is essential to the money concept.[79] This is true not only of depreciation in the market, but also of official changes in the legal ratio of gold, as occur in the case of "devaluation". (The consequences are of signal importance in the law of debts.)[80] Solution of doubts is furthermore facilitated by the peculiar significance of appellation in the monetary field. Whenever the lawgiver decides to introduce a new name for a monetary unit, this will be done, as experience shows, only where the legal basis of the currency is fundamentally changed. The new name is meant as a resounding pronouncement that the former unit, together with the system built around it, has been abandoned.[81]

77. *Infra*, p. 199.

78. Such an appraisal was undertaken by the *Reichsgericht*, Dec. 8, 1930, *R.G.Z.* 131, 4, denying with the writer—*Das Geld* (1925) 46—that the monetary system of the German colonies, despite minor divergencies was different from the German system.

79. *Supra*, p. 14.

80. *Infra*, sec. 12 I.

81. It has been said that the name in itself is not decisive. *Dougherty*

Thus the new name appears not only in the indubitable instances mentioned above (conquest; establishment of national government) but also where the former currency was annihilated by pernicious inflation. The creation of the German *reichsmark* (replacing the *mark*) and of the Austrian schilling (replacing the crown) in 1924 are examples. A famous instance is the renovation of her currency by Austria in 1892 when she passed from the guilder—despite its name, a silver unit—to the crown, a gold standard unit.[82] In virtually all of the pertinent situations the hypothesis of a new system is confirmed by the existence of provisions for the exchange of specific money and for the treatment of debts in the former currency.[83]

On the other hand where the old currency name is preserved, presumption is nearly as strong that there is no new monetary system. This follows not only from the fact that the identical name for two different units may engender utter confusion, but also because the preservation of the old name implies that there is no exchange of specific moneys and, more important, that debts contracted prior to the change can and must be legally discharged in currency of the old name according to face value. The devaluation of the dollar in 1934 is an outstanding example.[84]

While the distinction between alterations of a monetary unit and creation of a new one is indispensable to legal analysis, a broader approach will reveal that a certain continuity exists, even in the case of a new currency.

v. *Equitable Life Assurance Soc. of U. S.*, 266 N.Y. 71, 193 N.E. 897 (1937); *R.G.Z.* 142, 23, 29. While this is always true in a sense, it over-simplifies the problem.

82. This development is discussed at some length by Knapp, *Staatliche Theorie des Geldes* (4th ed., 1923) 398 (not contained in the English edition); see also Laughlin, *Money, Credit and Prices* (2d ed., 1932) 224.

83. Nevertheless the lawgiver some times favors similarity of the currency names. *Infra*, p. 198.

84. *Infra*, sec. 43 II. The Soviet monetary law of December 15, 1947 (tr. in *New York Times*, Dec. 15, 1947, p. 61) calls the *notes* newly to be issued "rubles of the 1947 model," but retains the name "ruble" for the *unit*. Actually a new currency was created with the new unit a tenth of the old one. Ruble creditors, therefore, received only 10 per cent of the nominal value of the debt [§ I (5) (b) of the law] though in addition to the legislative revaluation of bank accounts (*supra*, p. 112, n. 35) the Soviet Supreme Court granted revaluation to the Government (*New York Times*, Feb. 21, 1948, p. 12). The absence of investment by private capital and the relatively minor significance of credit in the Soviet system rendered the preservation of the old money name less disturbing. That preservation was probably prompted by a desire to minimize the importance of the action taken. Cf. also Baran, "Currency reform in the U.S.S.R.," *Harvard Business Review*, 1948, 194.

A new unit means a new gauge, and a new gauge, say a linear measure, cannot be introduced except by reference to one already known. In the beginning, at least, the new measure can be conceived and employed only by comparing it with the former unit. For instance, should the metric system be introduced in a country which uses the yard measure, people would first calculate the meters in terms of yards. This is also true of a new monetary unit. The latter, to be sure, is not invariable like a linear unit, and as soon as the new unit has taken root in the consciousness of the community, it may develop independently from its starting point. The mental process that attends its initiation, however, must necessarily employ the terms proper to the former unit. Even if the old unit was based on silver, the new unit being based on gold, the *homo oeconomicus* would conceive the gold standard unit first in terms of the silver standard unit.[85] Thus again the social-psychological method of inquiry proves its usefulness. Paradoxically, that immanent monetary continuity was first recognized by Knapp,[86] protagonist of the State Theory of money, an inconsistency which accounts for some flaws in his presentation.[87] Knapp is also the coiner of the

85. See also Keynes, *A Treatise on Money* (1930) 5: "It will be noticed that the money-of-account must be *continuous*. When the name is changed—which may or may not be coincident with a change in the money which answers to it—the new unit must bear a definite relation to the old. The State will, as a rule, promulgate a formula which defines the new money-of-account in terms of the old. If, however, failing a decree by the State, all contracts prior to a certain date are worked out in the old currency, and all contracts subsequent to that date are made in the new, even so the market cannot help establishing itself a parity between the two. Thus there can be no real breach in the continuity of descent in the pedigree of the money-of-account except by a catastrophe in which all existing contracts are simultaneously wiped out." Keynes' reasoning is obscured by the fact that to him, as to other English economists, the concept of "debt" is the primary one. *Supra*, p. 108. Specific money has disappeared from his field of vision. Nor is his remark on the "name" of money enlightening.

A reference to the continuity principle may be found in the observation of the *Reichsgericht*, March 17, 1932, *R.G.Z.* 136, 127, that the former *mark* currency (*Markwährung*), though replaced in 1924 by the *reichsmark* currency had not "perished."

86. *State Theory of Money* (tr. by Lucas and Bonar, 1924), p. 15. The translation is not precise; see the German original, *Staatliche Theorie des Geldes* (3d ed., 1921), p. 12.

87. According to Knapp, the link appears in the ratio chosen for the conversion of debts. This cannot be accurate since the ratio is often scaled. In fact, the reference to the conversion rule is out of place. The "backward linking" is accomplished in the minds of the

graphic expression, *recurrenter Anschluss* (backward-linking)[88] of the new unit with the old.

people who relate the new unit to the old. Again, the economist has been too legalistic in his analysis.

The process of backward linking is significantly illustrated by the creation of the American dollar, *infra*, sec. 41 III.

88. *Reichsgericht*, April 16, 1932, *R. G.Z.* 136, 87, adopted the term "*rekurrenter Anschluss*."

Chapter 2

DEBTS

Section 10

DEBTS IN GENERAL

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I. The Object of Debts

The term "debt" is used here in a broad sense,[1] to include pecuniary obligations of any kind, contractual as well as non-contractual, calling for payment both of liquidated and unliquidated amounts. What is owed must be a "sum" of representatives of a given "ideal unit". The "debtor" has a choice whether and what kind of coins or paper money shall be used in making the payment.[2] One speaks of a "sum" rather than of "quantities" of money, since the number of coins or notes is irrelevant. Even in minor payments the number of possible combinations may be formidable. Legislation supplies the debtor with the rules of this "combination game" by establishing the arithmetical ratios of the several money types to the ideal unit, and by regulating their legal tender quality. Hence the object of debt is subject at the outset to government determination. As the Supreme Court of the United States puts it,[3] debts have a "congenital in-

1. On the manifold meanings of "debt," see Williston, *Contracts* (rev. ed., 1936) sec. 11. Ordinarily "debt" presupposes a fixed sum of money. *Farmers' State Bank* v. *Sig Ellingson & Co.*, 218 Minn. 411, 16 N.W.2d 319 (1945).

2. This was misunderstood by Mr. Justice Strong in the *Legal Tender Cases*, *Knox* v. *Lee*, 12 Wall. (79 U.S.) 457, 552, 20 L.Ed. 287 (1871), *infra*, sec. 42, at n. 44.

3. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240, 308, 55 S.Ct. 407, 79 L.Ed. 885 (1935); *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324, 341, 57 S. Ct. 485, 81 L.Ed. 678 (1937). The same idea appears in a judgment of the Supreme Court of the Republic

firmity" in view of the ever-changing Congressional policies. The political nature of currency regulation is illustrated by the Austrian Civil Code which, with a few exceptions, omitted the rules on monetary rights and obligations, leaving their regulation to separate currency enactments.[4]

Governmental regulation and the "combination-game" feature are, then, characteristic of debts. They are absent in the case of other obligations. The structure of the latter is ordinarily less complex than that of debts which are seemingly simple, but in fact exhibit peculiar and perplexing features when subjected to legal analysis.

During the Middle Ages and later centuries monetary questions of a legal nature were treated mainly in connection with the subject of *mutuum* (loan).[5] The first general legal theory of debts was that presented by Friedrich Carl von Savigny in the first volume of his *"Obligationenrecht"* (1851).[6] Since then, this subject-matter has been systematically considered, principally by German and Swiss writers.[7]

Savigny's discourse has profoundly influenced later writers, but is far from being satisfactory. He relies strongly on an essay of the economist Hoffmann[8] in which he found the commonplace

of Colombia, Feb. 25, 1937, *Gaceta Judicial* XLIV 613.

4. See Charmatz, "Die Geschichte der geldrechtlichen Bestimmungen des oesterreichischen Privatrechts", in *Festgabe für Oscar Englaender* (Prague, 1937) 75.

5. A discussion of the monetary doctrines of earlier periods may be found in Gustav Hartmann, *Ueber den rechtlichen Begriff des Geldes und den Inhalt der Geldschulden* (Basel, 1868); Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre*, vol. 1 (1874), vol. 2 (1883); Taeuber, *Molinaeus' Geldschuldlehre* (1928) and, highly instructive, Taeuber, *Geld und Kredit im Mittelalter* (1933).

6. See also Archibald Brown, *An Epitome and Analysis of Savigny's Treatise on Obligations in Roman Law* (1872) 71.

7. See Hartmann, *op. cit.;* Wolff, "Das Geld" in *Ehrenbergs Handbuch des Handelsrechts* IV (1917) 563; von Tuhr, *Allgemeiner Teil des Schweizerischen Obligationenrechts* I (1924) 51; F. Eckstein, *Geldschuld und Geldwert* (1932); Thormann, "Die Geldschuld im schweizerischen Privatrecht", *Zeitschrift für Schweizerisches Recht*, 1937, 10; more from an economic angle: Landesberger, *Währungssystem und Relation* (Vienna, 1891) 151; Helfferich, *Money* (tr. by Infield, 1927); Knies, *Das Geld* (2d ed., 1885) 406. Pertinent writings in non-German languages are Planiol-Ripert, *Traité Pratique de Droit Civil Français* (1930) no. 1149 *et seq.* (*"paiement"*); Scaduto, *I Debiti Pecuniari e il Deprezzamento Monetario* (1924); Ascarelli, *La Moneta* (1928) 276; Seral, "El Problema de las Deudas de Dinero", in *Universidad* (Zaragoza), 1926, 315.

8. J. G. Hoffmann, *Die Lehre von*

that the cardinal characteristic of money is its exchangeability for goods and services. This "general financial power" *(allgemeine Vermögensmacht)* is, in Savigny's doctrine, what the debtor has to procure for his creditor. But general financial power is merely a description of the economic potentiality of money. It is neither a juridical concept, nor suitable for a legal definition of debts.[9]

In a commercialized community the importance of debt falls only a little short of the importance of money itself. In the first place this is the result of the common transmutation of stored tangible money into bank deposits, hence into debts. Generally the spread of the credit system is a decisive factor. In the minds of English economists, debts, as was mentioned before, have actually "repressed" the notion of tangible money altogether. Hawtry goes as far as to declare that the idea of money is derived from the idea of debt.[10] This really means turning things upside down, however large one might appraise the range of the debt element in the English and American economies.

In view of that range it is a puzzling fact that the English language has one expression, namely, "debt", to signify the "creditor" and the "debtor" side of the monetary obligation—the *"créance" (Forderung)* and the *"dette" (Schuld)*. (The creditor has the *"créance"*, the debtor has the *"dette"*.)[11] The lack of differentiation in English terminology is all the more noteworthy since the English language possesses an incomparably rich vocabulary.

Gelde (1838), repeatedly cited by Savigny.

9. Savigny apparently was aware of this defect and therefore tried to impress a juridical character upon his *"allgemeine Vermögensmacht."* He defined *Vermögen* as the whole of an individual's property rights, a legal concept. However, in the expression *"Vermögensmacht"* there is a shift in the meaning of the root *Vermögen* from the legal to the economic sphere. In fact, *allgemeine Vermögensmacht* is nothing but what is ordinarily called "purchasing power," a term then not yet in use.

A corollary of Savigny's doctrine is his "current value" theory. *Infra*, p. 219.

10. *The Gold Standard in Theory and Practice* (1939) 8. Consistently he defines the ideal unit ("money of account") as the unit "in which debts are reckoned." See also, Keynes, *supra*, p. 16, n. 63.

11. "Credit" is no equivalent of *créance*. Numerous kinds of debts (for instance, those resulting from torts or from bequests) are not "credits," a term characteristic of business relations solely. A "claim" is not restricted to money obligations, and presupposes assertive action not required by the concept of "debt." See also *Words and Phrases*, Perm. Ed., "Credit," "Claim."

II. Debt, a Personal Obligation

Rejecting the idea that a vague "power" is the subject of debts, and making the assumption that the obligation of the debtor is the delivery of tangibles, *i. e.,* of coins or paper money, it must nevertheless be admitted that there is a peculiar indefiniteness inherent in the concept of debt. Leaving aside payment by check and other money substitutes acceptance of which is at the payee's option, the specific moneys to be used in actual payment are undetermined at the time of the creation of the debt, except as to their basic unit, and as to their sum in terms of this unit. At the moment of contracting, the parties cannot foresee the money types that will be available at the time of payment, since, as we know, the constituents of the system are subject to all kinds of alteration. "Debt" therefore is the very opposite of a contract which creates rights in relation to specific property ("real" contract). In early English law, the notion of debt involved "a sum of money belonging to one person [the creditor] but in the possession of another [the debtor]," [12] a conception analogous to that still popular with respect to money deposited in a bank.[13] Yet this primitive notion, explainable perhaps by the scarcity and low velocity of coin at that time, is entirely absent in the modern idea of debt; it seems to have been imperceptible in the Roman law,[14] with its amazing anticipation of modern capitalistic legal mechanism. In our day it is a universal rule, as it was in Roman law, that a pecuniary obligation constitutes a right *in personam.* The creditor and the law rely entirely on the debtor's means or abilities to procure the money necessary for the discharge of the debt at the time of its maturity. In ancient Roman law this meant pledging his person, with the possible effect of being arrested by the creditor, through *"manus injectio"* [15] and of being

12. Pollock and Maitland, *The History of English Law,* II (2d ed., 1899) 205; Langdell, *Summary of Contracts* (1880) sec. 100. See also Ames, "Parol contracts prior to assumpsit," 8 Harv.L.Rev. 252 (1894).

13. *Supra,* p. 107.

14. Rabel, "Grundzüge des Römischen Privatrechts", in Kohler and Holtzendorff's *Encyclopädie der Rechtswissenschaft* I (7th ed., 1915) 459 [suggesting, however, that there might be a connection between the Roman *actio certae pecuniae* and the conception of a tort committed by the person committing the wrongful retention.]

15. See, *e. g.,* Girard, *Manuel Elémentaire de Droit Romain* (8th ed. by Senn, 1929) 1108, 1041; Buckland, *A Textbook of Roman Law* (2d ed., 1932) 618. The *manus injectio* presupposes a pecuniary obligation, Girard, 1050. The Twelve Tables (III 6) confer the right upon the creditors after the lapse of three weeks, to dismember the debtor *("Tertiis nundinis partis secanto. Si plus minusve secuerunt, se fraude esto").* This cruel old no-

sold eventually into slavery.[16] Sale of the debtor's belongings was apparently included in the proceedings. Bodily liability of the debtor, in its tempered form of imprisonment for debts, persisted up to the nineteenth century, but was then for the most part abolished.[17] Since that time only liability of the debtor's property, namely, of everything belonging to him, remains. This is the core of "personal" liability. As a matter of fact, protection of the holder of a debt has been considerably lessened in effectiveness. In case of the debtor's bankruptcy, the creditor is in the unfortunate position of having to depend on the bankruptcy dividend; in a characteristic English term, he is a "general" creditor, the great bulk of creditors falling within this category. Nor can there be, in Anglo-American law, any "specific performance" of a debt with its menace of imprisonment.[18] The great number of trust beneficiaries, express and constructive, who may have priority over the "general" creditors are further instrumental in rendering the latter's situation precarious.

The category of "personal" creditors is not confined to money creditors. It includes, for instance, a purchaser who under an agreement to sell is entitled to the delivery of a *res,* title to which has not yet passed. In fact, a claimant, not in *rem* to goods or to services is ordinarily considered a personal creditor.

On the other hand, specific money can be the subject of "real" or kindred rights and actions. Specific money may be followed, in Anglo-American law, by replevin,[19] and in civil law by property action (rei vindicatio) or by possessory remedies. However, as indicated,[20] litigation on specific money has little significance in our day.

tion is to be found in other primitive laws and might have influenced Shakespeare's perception of Shylock. Kohler, *Shakespeare vor dem Forum der Jurisprudenz* (1884) 30. The debtor's pledge of his body was well known to Germanic law, see Hübner, *History of Germanic Private Law* (tr. by Philbrick, 1918) 476.

16. See Joers-Kunkel-Wenger, *Römisches Privatrecht* (1935) 379.

17. Hanna and McLaughlin, *Creditors' Rights* (3d ed., 1939) 29; as to French law, see Planiol, *Traité Elémentaire de Droit Civil,* II (11th ed., 1935), no. 175 *et seq.;* for the German law, the Act of the North German Confederation *(Norddeutscher Bund* of May 29, 1868, abrogating imprisonment for debts, *Bundesgesetzblatt* 1868, 237, taken over by the German Reich at its foundation in 1871.

18. Pomeroy, *Specific Performance of Contracts* (3rd ed., 1926), sec. 48. Imprisonment for debts is still allowed in Vermont. Public Laws, 1933, Title 9, ch. 96.

19. *Sager* v. *Blain,* 44 N.Y. 445 1871). See *supra,* p. 96, n. 13.

20. *Supra,* p. 99.

III. Debt, an Indestructible Obligation

Obligations may be terminated by a subsequent impossibility of performance. While this proposition has a much wider application in civil law than in Anglo-American law,[21] the latter sometimes effects a release of the debtor on the theory that under the circumstances of the case the promise given was constructively conditioned upon continued possibility of performance.[22] However, neither rule is applicable where a money debtor, even by the most deplorable accident, becomes financially unable to pay his debts.[23] Inability of this sort would not constitute a defense in equity either.[24]

Even after the termination of a monetary system there is no vacuum left which would render payment impossible. As was pointed out, inauguration of a new system generally involves a recasting rule telling the debtor how much of the new money he has to pay in discharge of "old" debts.[25] Where the super-

21. *"Impossibilium nulla obligatio".* For French law, see Planiol, *Traité Eléméntaire de Droit Civil* II (11th ed., 1935), no. 620 et seq.; for German law, Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* II (9th ed., 1930) 248, and comment at §§ 275, 279.

22. Anson, *Principles of the Law of Contract* (5th Am. ed., by Corbin, 1930) 468, n. 2.

23. That impossibility of payment does not constitute a good defense was recognized as early as the time of the noted Italian commercialist Scaccia *"De Commerciis et Cambiis"* (1619) sec. 2 glossa 3; sec. 115. The rule was applied by the *Reichsgericht,* March 1, 1882, *R.G.Z.* 6, 125; App. Hamburg, March 31, 1922, *Hanseatische Gerichtszeitung* 1922, 183; Austrian Supreme Court, June 28, 1921, *Rechtsprechung* IV (1921) 73; Polish Supreme Court, February 21, 1922, *Orecznictwo* 294, referred to in *Rechtsprechung* IV (1922) 226; *Central Hanover Bank & Trust Co.* v. *Siemens und Halske A. G.,* 15 F. Supp. 927 (S.D.N.Y., 1936), *aff'd* 84 F.2d 993 (C.C.A.2d, 1936), cert. den., 299 U.S. 585, 57 S.Ct. 110, 81 L.Ed. 431 (1936), referring to Williston, *Contracts,* sec. 1972. The latter case bears upon the international effects of German exchange control, *infra,* sec. 31, at n. 23.

Impossibility to pay foreign currency owed presents a special problem. *Infra,* sec. 31 IV.

24. *Hopper* v. *Hopper,* 16 N.J.Eq. 147 (1863) [envisaging defenses to a decree for specific performance, against the vendee, of a contract for the purchase and sale of real estate].

25. Thus the German Coinage Act (*Münzgesetz*) of July 9, 1873, *R.G. Bl.* 1873, 233, §§ 2 and 3, creating the mark on a gold basis, provided for existing debts, couched in terms of Prussian silver thalers, a recasting ratio of 1 thaler to 3 marks —*supra,* p. 126, and in terms of South German (silver) guilders, a ratio of 1 guilder to 1-5/7 marks. When the reichsmark was established by the Coinage Act of August 30, 1924, *R.G.Bl.* 1924 II 254, the recasting ratio was determined on the basis of one trillion marks as equal to one reichsmark, except for "revaluation" cases. See *infra,* p. 201. The Austrian law on

seded ideal unit has undergone a process of gradual depreciation, recasting may be scaled according to the time of contracting.[26] In case legislation fails to prescribe a recasting rule for old debts,[27] the provision set for exchange of old money pieces against new ones may offer a convenient analogy.[28] Ultimately the rule of reasonableness must decide. That necessity arose in 1806 when Bavaria conquered Tyrol, then on the Austrian paper currency, and introduced the Bavarian silver guilder. The Bavarian government refused to formulate any recasting provision with respect to debts incurred in Austrian money, boldly announcing[29] that "common law"[30] included sufficient rules quite clear to a trained and thorough lawyer; a proposition so far from the truth that the controversy continued for many decades. While the case has attained a certain literary notoriety[31] the attitude of the courts is not known due to the absence—then common in Germany—of judicial reports. Under the circumstances a reasonable solution would have been to treat the debts as calling for payment in Austrian currency as before, thus making them debts couched in terms of a foreign currency, from the Bavarian viewpoint.[32]

schilling currency of Dec. 20, 1924, *Bundesgesetzblatt* 1924, no. 461, provided a ratio of 1:10,000 for the transition from the crown to the schilling. A most elaborate recasting rule is found in the Irish Currency Accommodation Act, 1825, 6 Geo. IV, c. 79.

26. Regarding the international aspects of the recasting rule, *infra*, sec. 24 V.

27. On the desirability of a recasting rule, cf. Soetbeer, noted economic expert on money, in *Die Deutsche Münzverfassung* (1881) 25.

28. Thus in a Moroccan case of April 23, 1923, *J.D.Int.* 1924, 441, the French *Cour de Cassation* converting a Moroccan debt into French currency simply referred to the exchange ratio prescribed in 1920 by the French authorities for the exchange of Moroccan currency for French francs.

29. Hufeland, *Ueber die rechtliche Natur der Geldschulden* (written in 1807, published at Savigny's instigation in 1851, see *infra*, p. 222, n. 80) 8.

30. Namely, the Roman law as "received" and developed in Germany.

31. Hufeland, *op. cit.*, discussing the Tyrolean events, suggested that a silver value be conferred upon the old debts, to be ascertained on the basis of the discount which the Austrian paper guilder had, in terms of the silver guilder at the time of contracting. This became one of the sources of Savigny's current-value doctrine, *infra*, p. 220, n. 75.

32. Professor Henry Ussing, Copenhagen *(Ugeskrift for Retsvaesen* 1926 B 199), in a detailed review of the author's book *Das Geld* (1925), refers to the fact that Denmark, in the law of June 28, 1920, no. 292, *Love og Anordninger*, 1920 A 868, refrained from enacting a recasting rule for mark debts when it introduced Danish currency into the territory ceded to it in 1920 by

Where new currencies have emerged through disintegration of a state, it is reasonable to assume a recasting rule which equates one unit of the new currency with one of the old. Thus, when the Austrian currency disintegrated in 1919, a debt of one (imperial) Austrian crown became a debt of one Czechoslovakian or Hungarian or (republican) Austrian crown.[33]

Another phase of the indestructibility of debt is indicated by the civil law principle under which the debt of a deceased debtor automatically passes on to his heir and upon the latter's death to the next heir, etc., *ad infinitum*. This notion does not obtain in common law, but there, too, the debt is not ended by the debtor's death; it passes on to the estate and must be discharged by the administrator or executor with priority over beneficiaries.

IV. Place of Payment

The manner of payment is principally determined by the general rule regulating the discharge of obligations, monetary and nonmonetary. Discussion of these rules would exceed the scope of the present study except for certain particular monetary aspects. By this token attention must be paid to the place of payment.[34] Under the Anglo-American rule the money debtor, in the absence of a contractual provision to the contrary, has to seek the creditor and make tender to him wherever he is found.[35] Payment will frequently be implied as having been contracted for at the place where the creditor resided when the contract was made. This theory clearly places the duty, cost, and risk of forwarding the money upon the shoulders of the debtor; the debt therefore is "deliverable" [in French *"portable"*, in German a *"Bringschuld"*] rather than "callable" [in French *"querable"*, in German a *"Holschuld"*]. This rule has not given rise to much doubt or litigation and is not even touched upon by such writers on Contracts as Anson and Pollock.

In civil law, the situation is different. The root of the existing intricacies lies in the multiplicity of legal functions tied up with the place of payment. In German law, and to a lesser extent in

Germany. Professor Ussing, approving of the writer's theory, suggests treating the mark debts in question as foreign-currency debts.

Where the hypothesis of a foreign currency is not feasible, the market price of the old unit, in terms of the new unit as at the law day of transition, should be held decisive.

33. *Supra*, p. 134 and reference there in n. 73.

34. The subject of "legal tender"—*supra*, sec. 4—forms another monetary phase of the rules on the discharge of obligations.

35. See Williston, *supra*, n. 1, at , sec. 1812.

other legal systems, the place of performance is one of the most important grounds for the determination of venue and jurisdiction in contractual litigation.[36] And far beyond Germany, a powerful conflict-of-laws doctrine has made the place of performance determinative of the law to be applied to contracts.[37] These facts explain the concern of civil law systems in the subject matter. But the complexity of the doctrine is due to another factor. As to venue and jurisdiction, there is a tendency in modern civil law, inherited from Roman law, to relieve the debtor, presumably the defendant, of the onerous burden of litigating outside of his domicile; *"actor sequitur forum rei"*. This conception operates toward making the debtor's domicile the ordinary place of his performance, a principle which is in harmony with a time-honored tradition.[38] With regard to the cost and risk of payment, however, the Anglo-American rule is obviously sound, especially under modern conditions of communication which make the burden easily bearable by the debtor. The Central European Codes therefore distinguish between the place of performance (*"Erfüllungsort"*) or more specifically place of payment (*"Zahlungsort"*) which in case of doubt is the place of the debtor's domicile,[39] and the "place of destination" (*"Bestimmungsort"*) which ordinarily is the place of the creditor's domicile. Normally the debtor has to "pay" at his own domicile with the concomitant obligation of sending the money at his cost and risk to the creditor's domicile.[40] By this artificial device the law favors the debtor with regard to jurisdictional and Conflict-of-Laws requirements, but favors the creditor with regard to the risks of payment. The price paid for this solution, which to a

36. German Code of Civil Procedure 32; Austrian Judiciary Code *("Jurisdictionsnorm")* 88; Italian Code of Civil Procedure of 1940 Art. 20.

37. See the writer's *Deutsches Internationales Privatrecht* (1932) 217 with references to German and Swiss law. The expansion of the place-of-payment doctrine is partly due to Savigny. Gutzwiller, *Der Einfluss Savigny's auf die Entwickelung des Internationalen Privatrechts* (1923) 92.

38. Casselli, in *"Digesto Italiano"* (1906–1910) XVIII 27 and 59, "Pagamento", traces it back to Molinaeus, the famous French jurist (1500–1566). The ancient Roman law was ill-defined as to this point, Casselli 23.

39. German Civil Code 269; Austrian Civil Code 905. Express or implied provisions of the contract are given precedence over the Code rule, as correctly stated in *Pan-American Securities Corporation* v. *Friedrich Krupp A. G.*, 169 Misc. 445, 6 N.Y.S.2d 993 (1938). The Swiss Law of Obligations, Art. 74, par. 2 (1) designates the creditor's domicile as the normal place of payment.

40. This is true even if the creditor resides abroad, App. Berlin, *(Kammergericht)* June 6, 1918, *Seufferts Archiv* LXXIV 1.

certain extent may be explained historically,[41] is a complete distortion of the place-of-payment conception, nothing being actually "paid" at that place since the real payment is made at the place of "destination". This has led to considerable confusion.[42]

While the Latin legal systems, by contrast with the Central European, have refrained from overemphasizing the place-of-payment concept,[43] they still cling to the traditional rule that the debtor's domicile is in doubtful cases the proper place of payment.[44] This adherence to tradition, however, has not prevented the French *Cour de Cassation* from imposing upon the debtor the risk involved in sending money to a creditor abroad.[45]

In more recent times both common law and civil law courts have resorted, in Conflict-of-Laws situations, to the criterion of the place of payment. The results reached are frequently, if not in the majority of cases, unsound. As long as money was actually transported for outside payments, the place of payment carried a certain weight. But under modern banking conditions

41. The rule was an outgrowth of the Uniform German Commercial Code *(Allgemeines Deutsches Handelsgesetzbuch)* of 1861 (Art. 325), the draftsmen of which had no authority over procedural law. They were compelled, indeed, to leave the "place of performance" at the domicile of the debtor, lest undesirable results appear in the field of jurisdiction. See the writer's *Das Geld* (1925) 74.

42. In order to avoid inconvenient results, courts have frequently read into contractual clauses establishing a definite *Zahlungsort*, an agreement that in fact only a *Bestimmungsort* was meant by the clause. *Reichsgericht*, Dec. 7, 1921, *R.G.Z.* 103, 259; Austrian Supreme Court, May 24, 1924, *Zentralblatt für die Juristische Praxis*, 1924, 497; App. Dresden, March 27, 1907, *Seufferts Archiv* LXIII 387. Contrariwise the Supreme Court of Hungary, June 20, 1924, *Zeitschrift für Ostrecht*, 1927, 439, treated the place of destination as the place of performance.

43. In French law this place has no jurisdictional relevancy at all. Nor is there much resort to the place of performance in Latin private international law, with the exception of the Argentinian Civil Code 1209/10.

44. French Civil Code 1247 (qualified by Arts. 1903, 1943); Italian Civil Code of 1865, Art. 1249 (see Pacifici-Mazzoni, *Istituzioni di Diritto Civile Italiano*, IV [5th ed. by Venzi, 1927-29] 544 and 618); Spanish Civil Code 1171, par. 3, Argentina Civil Code 618; Brazilian Civil Code 950. In determining the debtor's domicile, resort must be had to the time of payment rather than of contracting. Cass., July 9, 1895, *D.P.* 1896 I 349. The debtor has to bear the cost of payment according to French Civil Code 1248; Italian Civil Code of 1865, 1250; Spanish Civil Code 1168. The Italian Civil Code of 1942, Art. 1182, par. 2, has shifted the subsidiary place of performance to the domicile of the creditor.

45. Cass., March 30, 1925, *D.P.* 1927 I 168. Same: Judge of the Peace Beauvais, August 26, 1925, *Gazette du Palais*, 1926 I 335.

this is no longer true. Suppose a London debtor has to pay a New Yorker in dollars. If for one reason or another (probably jurisdictional)[46] London was stipulated as the place of payment the debtor will send the creditor a check on London or make a remittance on a London bank unless he simply pays by check on New York.

All considered, the place of payment is in our day no more than a matter of postal or banking facilities. While in some situations it furnishes a helpful criterion, its value has been greatly exaggerated in the practice and doctrine of private international law.[47]

V. Mandatory Money Obligations

The law prescribes that certain types of obligations must be couched in terms of money and no other. This is particularly true of the law of negotiable instruments such as bills of exchange and checks.[48] As early as 1706 the Statute of Anne,[49] well-spring of Anglo-American law on the subject, required the instrument to call for "any sum of money". The same rule prevails in modern common law and civil law,[50] providing a crucible for testing the money concept. In recent times, the money requirement has become more refined in that the instrument must express a "sum certain",[51] a formula precluding, for instance, a sum defined by a reference to market prices or index numbers. The explanation is the desire of the lawgiver to keep dubious and controversial terms away from these instruments which are designed for routine treatment and easy trading. Consequently a strict interpretation of the statutory requirement seems desirable, a fact well understood by English courts.[52] In this country com-

46. For instance, in order to come under Order XI Rule 1(c) of the Rules of the Supreme Court, which assume jurisdiction over a breach of contract committed in England. *Annual Practice* (65th ed., 1948) 96.

47. For instances, see on the one hand *infra*, sec. 26 I, on the other, secs. 29 I and 32 II.

In the case of exchange control (infra, sec. 31) what matters is the place where the money is actually given or forwarded, rather than the contractual "place of payment."

48. An excellent study on the subject is by Oliphant, "The theory of money in the law of commercial instruments," 29 Yale L.J. 609, 611 (1920).

49. 3 & 4 Anne, c. 9.

50. F. Meyer, *Das Weltwechselrecht* (1909) I 101, II 63.

51. This formula has been adopted by the (U. S.) Uniform Negotiable Instruments Law, § 1(2), the Uniform Geneva Acts on Bills of Exchange and on Checks, § 1(2), and the (English) Bills of Exchange Act, 1882, § 3.

52. For instance, a written promise to pay in notes of the Bank of England was held nonnegotiable in

mercial experience has not been so old and so general as in England with the result that a more indulgent practice has come to prevail. Georgia still has a law permitting promissory notes payable in cotton or other articles of value, a residue of colonial times when money was scarce.[53] Prior to the Civil War the preponderance of state bank notes of all imaginable varieties led the parties to insert in the instruments such clauses as ($100) "in current bank bills," "in current Ohio bank notes", etc., the general tendency of the parties being to secure the creditor's acceptance of those types of "refusable" money. The several State jurisdictions responded to the clauses in different ways, creating a chaotic condition of the law.[54] Later, when the "greenbacks" became legal tender a tendency to secure their acceptance over constitutional objections[55] appeared in a familiar clause calling for payment of ($100) "in currency". Such clauses were rightly held good by the courts.[56] Even today the Uniform Negotiable Instruments Law permits the designation in the instrument of "the particular kind of current money in which payment is to be made."[57] This concession to inveterate habits which seems primarily to refer to gold clauses, was never desirable and is entirely out of place in present conditions. To what extent negotiable instruments may be expressed in foreign currency is not definitely settled in American law.[58]

Another type of mandatory money obligations originates in legislative enactments which order employers to pay their workers in money, thereby protecting the workers against compulsion to take part of their wages in the form of goods furnished them through a "company shop". In England these so-called Truck Acts, or rather Anti-Truck Acts[59] form a very old type of social legislation reaching back to the Middle Ages.[60] In modern times numerous countries have followed the same line.[61] In this coun-

Rex v. *Wilcox* (1808), n. 15 to Bayley, *Bills* (1st Amer. ed., 1826) 6. *Gray* v. *Warden*, *supra*, p. 231, n. 7, exhibits the same tendency.

53. Georgia Code (1933) § 14-201(2).

54. Oliphant, *supra*, n. 48, at 614, 615; Daniel, *Treatise on the Law of Negotiable Instruments* I (1933) sec. 62; both with ample references to cases.

55. *Infra*, sec. 42 II.

56. A well-reasoned case on this is *Klauber* v. *Biggerstaff*, 47 Wis. 551, 8 N.W. 357 (1879). For the earlier period see *Butler* v. *Paine*, 8 Minn. 324 (1863); *Phelps* v. *Town*, 14 Mich. 374 (1886).

57. § 6(5) of the law.

58. *Infra*, sec. 24 II.

59. Truck (the French *troc*) is an early synonym of barter.

60. 4 Edw. IV, c. 1 (1464), relating to workers in the woolen cloth-making trades. The basis of modern law on the subject is the Truck Act, 1831, 1 & 2 Wm. IV, c. 37.

61. French *Code du Travail* (1910)

try many States, among them New York,[62] have adopted statutes restricting the issuance by the employer of "scrip" and "tokens" to the worker for the purchase of goods in the employer's store. (In the United States one speaks of Company Shop Acts rather than of "Truck Acts" or "Anti-Truck Acts.") The language of the Acts, American and others, is ordinarily to the effect that wages must be paid in "cash".[63] In the modern era of collective bargaining—not to speak of the post-war dearth of goods—the Anti-Truck legislation has lost much of its significance.[64]

Again, in a modern State where administration is conducted on the basis of a budget, taxes must be assessed and paid in money. Sometimes this principle is expressly set out in state constitutions [65] in order to protect rural legislators from local pressure groups who would try to force upon the government the acceptance of products or services as taxes.

There are still other types of mandatory money obligations [66]

I, art. 43; German *Reichsgewerbeordnung* (1900) 115, 116, 117 par. 1, 146 par. 1(1).

62. N.Y. Labor Law (1935) § 195. For collections of these statutes see 4 Commerce Clearing House, *Labor Law Service* § 46500; U. S. Dept. of Labor, Bureau of Labor Statistics, *Bulletin #408, Laws Relating to Payment of Wages* (1926, by Clark and Tracy). The laws, attacked as violative of the so-called "liberty of contract," were held constitutional in *Knoxville Iron Co.* v. *Harbison*, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55 (1901).

63. For instance, in the New York Act. The English Act of 1831 speaks of "current coin of the realm" and requires consent of the employee to payment in bank notes.

64. Nevertheless, it is surprising how little American literature on labor law takes cognizance of the existence of the numerous State "Truck" Acts. They have given rise to numerous problems and cases.

65. Cf. *Frauenfelder* v. *State ex rel. LaPrade*, 45 Ariz. 183, 41 P.2d 311 (1935). Without reference to a constitution, a similar result was reached in *Wells* v. *Cole*, 27 Ark. 603, 605 (1872) [State legislation cannot make State "scrip" receivable in county taxes].

66. For instance, attachment lies only for "sums of money." N.Y. Civil Practice Act, § 902. Also, summary proceedings are often reserved for money claims, or even for claims involving a sum certain. See, for Connecticut, Clark and Schulman, *A Study of Law Administration in Connecticut* (1937) 50. Until 1933, New York opened summary proceedings only to claims for a sum certain. Clark and Samenow, "The summary judgment," 38 Yale L.J. 423 (1938). Authority to "confess judgment" is lawful only where the amount is clearly stated in terms of money. *Gerber Co.* v. *Thompson*, 84 W.Va. 721, 100 S.E. 733 (1919).

Similar practice prevails in Central European law. German Code of Civil Procedure 592 [*Urkunden-und Wechselprozess*], 688 [*Mahnverfahren*], 794(5) [*Vollstreckbare Urkunde*]; Austrian Code of Civil Procedure 548 [*Mandatsverfahren*].

but they need not all be listed here. One of them, the mandatory money judgment, requires special consideration.

VI. Money Judgment and Specific Performance

Money obligations are easier to enforce than others. Where a money judgment—that is, a judgment for the payment of a fixed sum [67]—is obtained, everything possessed by the debtor may be levied upon and the proceeds realized by public sale or otherwise are available for the discharge of the debt. The entire proceeding, especially because of its frequency, develops along routine lines, making this sort of compulsory execution superior to others. It is more simple than the various methods used to enforce the doing or omission of an act by putting pressure upon the debtor through threat and punishment. These methods, securing what has been called "specific performance" have been developed relatively late.[68] In the common law, since the sixteenth century, the theory has evolved that a party not carrying out specific performance as ordered is guilty of "contempt of court," which has to be overcome, if necessary, by imprisonment. This idea is unknown to civil law.[69] Up to the present most of the Latin codes suffer from inadequacy of machinery for the enforcement of nonmonetary judgments. The Central European Codes are better equipped in this respect.[70]

67. Former legal systems typified by "forms of action" offered special forms for the recovery of a sum certain: the *condictio* (actio) *certae pecuniae* in Roman law (see, e.g., Girard, *Manuel Élémentaire de Droit Romain* [8th ed. by Senn, 1929] 523) and the action of debt in the old common law (see, e.g., Shipman, *Common Law Pleading* [3d ed. by Ballantine, 1923] 132).

68. As to the history of specific performance, see Fry, *Specific Performance* (6th ed., 1921), ch. 1; Ames, *Lectures on Legal History* (1913), chap. xxii. However, common law early used the proceeding of distress (*distringas*), viz., of attaching the debtor's chattels, perhaps repeatedly, in order to force him indirectly to deliver goods he owed. See *e.g.*, Blackstone, *Commentaries* III *413; Jacobs, *Law Dictionary* II (1811) 482. For an early American case illustrating this procedure, see *Molloy's Ex's* v. *M'Daniel*, 1 Overton (Tenn.) 222 (1806).

69. See the brilliant discussion by Pekelis, "Legal techniques and political ideologies," 41 Mich.L.Rev. 665 (1943). An interesting research is presented by Krassa, "Interaction of Common Law and Latin Law: enforcement of specific performance in Louisiana and Quebec," Can.Bar Rev. XXI (1943) 337.

70. The German Code of Civil Procedure 883–898 and the Austrian *Executionsordnung* 346–369 offer elaborate systems of rules for enforcing specific performance of nonmonetary judgments. The main means consists of fines against, and eventually imprisonment of, a reluctant defendant. In Switzerland, enforcement of a money judgment

Under Roman law [71] each judgment against the obligee had to be a money judgment; nonmonetary claims were to be transmuted into monetary ones for the purpose of adjudication. *"Omnis condemnatio pecuniaria est."* It is remarkable that the ancient Roman rule, long abandoned in civil law countries, forms a basic autochthonous principle of Anglo-American law. Equity, under an elaborate body of rules, prescribes the conditions under which the court will grant specific performance. Generally the court will do so only where money damages are deemed inadequate. Normally, nonmonetary claims must be transformed into damages just as under Roman law. The French Civil Code, Art. 1142, also prescribes that "each obligation to act or not to act, in the case of non-performance, resolves itself into damages". This rule, however, was qualified by broad exceptions in the Code [72] and has been further weakened by the courts. Carrying on a pre-Code tradition they developed a species of injunction *(astreintes)* purporting specifically to enforce the act or omission by threat and infliction of fines.[73] The Italian Code has not taken over the rule of Art. 1142 of the French Code. Under Central European law there is no doubt that a plaintiff pursuing a nonmonetary claim has a right to a nonmonetary judgment—a rule on principle preferable to the Anglo-American. Practically, the difference is not too significant because plaintiffs, as a matter of expediency, will ordinarily prefer to shift from nonmonetary claims to damages, availing themselves of special rules elaborated for this purpose by the substantive law.[74] Moreover, in the case of the debtor's bankruptcy, his nonmonetary obligations become debts in the sense that they have to be satisfied out of the bankrupt estate through a money payment.[75] This policy has wider

is regulated by federal law. Federal Act on Debt Enforcement and Bankruptcy (*Bundesgesetz über Schuldbetreibung und Konkurs*) of April 11, 1889. Regulation of specific performance is left to the Cantons. Novel norms on the subject have been set forth in the Italian Code of Civil Procedure of 1940, Arts. 605 *et seq.*

71. Girard, *supra*, n. 67, at 1109 *et seq.*, 1145 *et seq.*

72. French Civil Code 1143, 1144. Delivery of a chattel owed is specifically enforced under the Code of Civil Procedure, art. 826 et seq. See also Amos, "Specific performance in French law," 17 L.Q.Rev. 372 (1901).

73. Cf. Planiol and Ripert, *Traité Pratique de Droit Civil Français*, VII (1930) 84. The *astreinte*, however, is a most imperfect remedy. Pekelis, *supra*, n. 69, at 669.

74. There is ordinarily no difficulty for the plaintiff to obtain damages rather than specific performance. See, *e.g.*, French Civil Code 1146, 1147; German Civil Code 249(2), 250, 251 par. 2, 283, 325, 326.

75. This is expressly set out in the German Bankruptcy Act (*Konkursordnung*) § 69. Jaeger, *Kommentar*

application in civil law because the common law priorities derived from trust, equitable ownership and lien, do not exist in civil law to any similar extent.[76] There is no need to go further into detail. From the angle of monetary doctrine the main point is that under Anglo-American law each obligation is actually or potentially monetary.

VII. Obligation to Deliver Fungible Things

The logical connection of the money concept with the notion of fungible things, manifests itself historically in the chapter on debts, through remarkable economic and legislative facts. In antiquity, even after the use of money had become common, loans were often made in fungible things other than money.[77] This appears particularly from the Egyptian papyri which show that loans of wheat were frequent;[78] and even in Justinian's Corpus Juris, where money represents the almost exclusive subject of loans, the Code refers occasionally to loans made in grain, oil, or wine. Indeed, the Roman doctrine of loan, formed several centuries before the promulgation of the Corpus Juris, associated money and other fungible things as the possible objects of a loan (*mutuum*).[79] This association was extended by the Romans to other credit transactions,[80] but the basic diversity of money loans and other loans appeared early in antiquity.[81] Treating

zur Konkursordnung II (6th ed., 1936) 244, n. 10, cites a number of non-German bankruptcy acts containing similar provisions.

76. The application in bankruptcy of the concepts of trust and equitable ownership or lien creates priorities in specific property as against the trustee in bankruptcy and the creditors. More recently, priorities have been reduced as far as bankruptcy is concerned by the 1938 amendment to § 60A of the Bankruptcy Act, 11 USC 96(a), denying the preference wherever a bona fide purchaser would not be protected.

77. Egon Weiss' article on "Kredit" in Pauly-Wissova, *Realencyclopadie der Classischen Altertumswissenschaft* XI (1922) 1694 is particularly informative.

78. Berger, *Die Strafklauseln in den Papyrusurkunden* (1911) 103; Mickwitz, *Geld und Wirtschaft im Römischen Reich des Vierten Jahrhunderts* (1932) 127, 207. An example of a loan of wheat, made in the first century *B. C.*, is found in 1 Hunt and Edgar *Select Papyri* (1932), "Agreements" No. 68. On loans of grain in ancient Babylon (about 2000 B. C.), see Taeuber, *Geld und Kredit im Mittelalter* (1933) 40.

79. See Gaius in *Dig.* 44, 12, 1, 2: "*Mutui datio consistit in his rebus quae pondere numero mensura constant veluti vino oleo fromento pecunia numerata . . .*"

80. Namely to the "constitutum", Cod. 4, 18, 2. See Buckland, *A Manual of Roman Private Law* (1928) 307.

81. In the case of loans made in fungible goods the crucial point was to ascertain, by contractual

both types alike is inappropriate indeed in a developed monetary economy in which "loans" of commodities are extremely rare phenomena and perform functions entirely different from typical money loans. It is indicative of the potency of Roman legal tradition that the ancient doctrine has been taken over by all of the modern Civil Codes.[82] The majority of them have substituted "consumability" for fungibility, "consumable" things being those the ordinary use of which consists in their consumption. This is true of money, the expending of which is its ordinary use.[83] The German Codes, however, have not only restored the pure Roman concept but have pushed the use of the combination, "money and other fungible things", to its extreme. In addition to loans and "irregular deposits" (involving a transfer of ownership to the "depositary") which may be made in any kind of fungible things,[84] the juxtaposition of money and fungible things is found in the statutory requirements for certain quasi-negotiable instruments,[85] and for summary judicial proceedings.[86] Very few cases have given occasion for an application of those rules to nonmonetary objects. They were mainly concerned with fungible securities such as bonds or stocks,[87] and have sufficient-

provision or otherwise, the sum to be paid by the debtor in case of his default. Nor is the interest situation comparable. See Berger, *supra*, n. 78, at 103; *infra*, p. 157.

82. The old formula still reappears in Italian Civil Code of 1942 § 1813; see also Cosentini, *Code International des Obligations* (1937) 2173.

83. The French Civil Code defines the *"prêt de consommation, ou simple prêt"*, *viz.*, the ordinary loan, in terms of a definite quantity of things *"qui se consomment par l'usage"*, Art. 1892, 1874, a theory which also appears in the Austrian Civil Code 983, the Argentine Civil Code 2240 and the Italian Civil Code of 1865, Art. 1819. The variance of definition is hardly of any noticeable significance.

84. German Civil Code 607 [loan], 704 [irregular deposit]. § 704 does not specifically mention money. On the Roman origin of the "irregular deposit", see Girard, *supra*, n. 67, at 564.

85. German Civil Code 783 *(Anweisung)*; Commercial Code 363 *(kaufmännische Anweisungen und kaufmännische Verpflichtungsscheine)*.

86. German Code of Civil Procedure 592, 688, 794 No. 5.

87. Of course there is no real "loan" of securities where the borrower has to restore in money the value of the securities received. Cass., Mar. 19, 1928, *D.H.* 1928, 303; *Reichsgericht*, Jan. 7, 1881, *R.G.Z.* 3, 324. So-called "loans" of securities are sometimes mentioned in complicated corporate stock transactions aimed at tax advantages and other objectives not usually associated with loans. For examples, see the writer's "Acquisition by a corporation of its own stock", 35 Col. L. R. 971, 990, n. 89 (1935), and *Pierre S. duPont* v. *Commissioner*, 37 *Board of Tax Appeals* 1198 (1938). Cf. furthermore, *Reichsoberhandelsgericht*, May 19, 1876, *Entscheidungen des Reichsoberhandelsgerichts* XX 303, where in reality stock was sold under the purchaser's obliga-

ly revealed the substantial diversity between nonmonetary and monetary situations.[88] The anachronism has merely resulted in complicating and obscuring the law.[89]

In the common law that unfortunate Roman doctrine was not received. The fungibility concept has been introduced only recently into American law, yet has not been coordinated with the money concept.[90] It is not used by English courts, and only slight attention has been paid to it in Anglo-American legal science.[91]

tion to restore *new* stock in case of another authorization of stock. In *Reichsoberhandelsgericht*, Dec. 29, 1872, *ibid.* VII, 344, the form of "lending" bonds apparently was chosen in order to disguise the real rate of interest, which was to consist of the ostensible interest and of an obligation of the borrower to restore the interest coupons which matured within the loan period. As to the former German *Pfandbriefdarlehen* (mortgage-bond loans) see the writer's *Deutsches Hypothekenwesen* (2d ed., 1921) 233 (Spanish ed. by Prof. Roces, Salamanca: *Tratado de Derecho Hipotecario Aleman* [1929] 308).

88. A "loan" of used tires to be restored by new tires is referred to in *Reichsgericht*, Oct. 9, 1922, *Deutsche Juristenzeitung*, 1923, 112 but the transaction should be classified as a barter. Practically the problem of classification was irrelevant.

89. Under § 607 of the German Civil Code, (and similarly under the new Italian Code of 1942, § 1813) the borrower is obligated to return to the lender, "things of the same kind, quality and quantity", as received. While "quality" obviously bears upon loans of fungible *goods*, the *Reichsgericht* in its great revaluation judgment of November 28, 1923, *R.G.Z.* 107, 78, *infra*, p. 206, relates it to the fact that the *money* borrower has to supply money of the same value. "Quality", however, is not value, and if money has depreciated, money of the former value no longer exists. Moreover, the argument proves too much, since under the revaluation theory the lender is not entitled to the full value of his original performance, but only to an equitable compensation. The argument soon disappeared from the numberless revaluation cases.

90. In this connection, see *Kimberly* v. *Patchin*, 19 N.Y. 330 (1859), where despite the absence of the term "fungible" from the opinion, the influence of Roman law is apparent from the examination of the rule that title can pass to unascertained goods of a class typified by such commodities as "wine, oil, wheat, and the other cereal grains and the flour manufactured from them . . ."; wine, oil, and wheat being—in the same sequence—the instances given in the Roman sources *supra*, p. 154, n. 79. The rule was adopted and the term "fungible" first employed by Williston in 1902 in drafting the Uniform Sales Act 76; which term and definition were at a later date incorporated into the Uniform Warehouse Receipts Act, sec. 58. See also Restatement, *Restitution* (1937), § 66 (e).

91. For discussions of this topic, see Holland, *Jurisprudence* (9th ed., 1900) 99, 275; Austin, *Jurisprudence* II (5th ed., 1911) 778–80; Terry, *First Principles of Law* (3d ed., 1894) secs. 250, 648, 821; Kocourek, *Jural Relations* (1927) 313–14, 322.

Section 11

INTEREST AND USURY

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I. Interest

Interest is a periodic payment by the debtor to the creditor as compensation for the debtor's use of the sum received. The civil law systems struggle along with the notion that interest may also consist of periodic supplies of nonmonetary fungible goods as compensation for a loan of goods of the same kind.[1] However, this type of transaction is not present in the *Corpus Juris* or in the papyri of Egypt though in their eras wheat loans were in vogue; interest seems to have consisted of a single performance, usually fifty per cent of the amount of the principal, deliverable after the harvest of the crop which resulted from the "borrowed" grain.[2] The continuance of commodity interest in modern Codes is another, and a particularly flagrant, instance of unwarranted and traditionalistic assimilation of fungible commodities to money.

Interest, though ordinarily a matter for stipulation, express or implied, is frequently granted by operation of law. In civil law, such an obligation results from the *mora* [*demeure, Verzug*] of the debtor, which, as in Roman law, means delay or omission of performance by the debtor without legal justification.[3] In this situation, interest accrues without express or implied agreement of the parties. The rationalization of the rule is that in a modern economy the creditor presumably would have been able to obtain a profit from the principal had it been paid to

1. Specifically so the French Civil Code 1905, the [1942] Italian Civil Code 1815, the Brazilian Civil Code 1262, and the Austrian Civil Code 984. As to German law, see Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* II (9th ed., 1930) 106, including, in harmony with the dominant German doctrine, fungible things in the definition of interest.

2. E. Weiss, *supra*, p. 154, n. 77, at 1697.

3. See Planiol, *Traité Elémentaire de Droit Civil* (11th ed., 1935) III, 164; Staudinger II, 324. As to ancient Roman law, cf. Girard, *Manuel Elémentaire de Droit Romain* (8th ed. by Senn, 1929) 688; Buckland, *A Textbook on Roman Law* (2d ed., 1932) 550.

him in time. The common law rule, developed at a less advanced state of national economy, did not allow interest, even for a breach of contract, [4] unless it had been agreed to by the debtor. However, in England, the rule was limited by broad exceptions, practically covering the entire field of business indebtedness; it finally was replaced by the court discretion to grant or deny interest, and in the former case to determine its rate.[5] In the United States, interest, by way of damages, is generally allowed for the unlawful detention of money.[6] To that extent American law is in substantial harmony with civil law.

Legal standards for the rate of interest, indicating "legal interest" (as distinguished from maximum interest) [7] are ordinarily prescribed by statute, generally ranging from four to eight per cent. Where interest is allowed, these statutory standards are applicable when there is no stipulation relating to the rate.[8] Under modern conditions it would seem desirable to link the legal standard with the official discount rate of the central-note institute. That has to a certain extent been done under German, Swiss, and Argentine law.[9] However, in connection with nonbusiness relationships, an invariable statutory rate might be preferable.

4. Sedgwick, *Damages* (9th ed., 1912), sec. 283.

5. Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. V, c. 41, sec. 3(1). As to the former law, see Sedgwick, *op. cit.*, secs. 284–291.

6. Interest is generally allowed as an element of the total damage for breach of an express contract, Williston, *Contracts* (rev. ed., 1937), secs. 1410, 1413, and in quasi-contractual actions, Williston, sec. 1'15. As to the rate of interest, see Williston, sec. 1416.

7. Both rates may coincide as they ordinarily do under New York law, *Restatement, Law of Contract, N. Y. Annotations* (1933) 334.

8. See, *e.g.*, French law of April 7, 1900, *D.P.* 1900 IV 43 (4%, in commercial matters 5%), suspended by law of April 18, 1918, *D.P.* 1918 IV 188 (5%, in commercial matters 6%) and reestablished by decree of Aug. 8, 1935, *D.P.* 1935 IV 225; German Civil Code 246 (4%), German Commercial Code 352 (5%); Italian Civil Code of 1942, Art. 1284 (5%).

On Conflict of Laws Questions, *infra*, notes 58 to 62; sec. 24 I.

9. Under German law, two per cent above the discount rate of the Reichsbank and a minimum of six per cent were allowed to the endorser of a bill of exchange or check, seeking recourse against prior parties. Act of July 3, 1925, *R.G.Bl.* 1925 I 93. The Swiss Law of Obligations 104, par. 3, provides, as between merchants, a rate of "delay interest" equivalent to the "customary bank discount" in case the latter exceeds 5 per cent. The Argentine Commercial Code 565 applies the banking discount rate to contractual interest not fixed in terms of percentage. On interest rates in heavy inflation, *infra*.

Where interest is granted because of *"mora"* or a breach of contract on the part of the money debtor, Anglo-American [10] as well as Latin law [11] considers it as the full measure of damages. Further damages for nonpayment on the ground of *"mora"* or breach of contract are not permitted. The purpose is to eliminate vexatious litigation over what the creditor would ordinarily have done with the money. In view of the frequency with which such questions would be raised, the juggling of these speculative and arbitrary elements is doubly undesirable. In times of monetary troubles, the rule reveals another important advantage because it excludes judicial controversies on depreciation and buttresses the official policy which is necessarily aimed at maintaining the legal parity of the monetary unit. The rule is not applicable to a number of special (particularly commercial) situations under the Latin Codes,[12] and is unknown to German and Swiss law.[13] To this extent the creditor will be allowed the damages actually sustained by him. This is generally the proper view where foreign currency is owed.[14]

A frequently used rule on interest relates to the Statutes of Limitation. In civil law short periods are ordinarily provided

10. Williston, *Contracts* (rev. ed.) sec. 1410. This was not always the rule. Cf. an early North Carolina case where damages in addition to interest were awarded, *Anonymous*, 1 Hayw. (2 N.C.) 354 (1796), with remarkable annotation.

11. French Civil Code 1153, as amended by Act of April 7, 1900 (*supra*, n. 8); Italian Civil Code of 1865, Art. 1231; Spanish Civil Code 1108; Brazilian Civil Code 1061. The Austrian Civil Code 1333 follows the French rule. The Italian Code of 1942, Art. 1224, par. 2 allows damages beyond legal interest. This rule has been given retroactive effect, Act of March 30, 1942 *Lex* 1942, 585, Art. 160. Cf. *Transamerica General Corp.* v. *Zunino*, 82 N.Y.S.2d 595 (Sup.Ct. 1948).

12. The French Code 1153 exempts the case of the debtor's bad faith as well as commercial and surety matters. Cass., Dec. 2, 1925, *Recueil de la Gazette des Tribunaux* 1926 I 36, has even allowed recovery of damages for loss inflicted upon the creditor through the debtor's fault.

13. German Civil Code 288 par. 2; Swiss Code of Obligations 106; Austrian Commercial Code *(Allgemeines Deutches Handelsgesetzbuch)* 283. The Italian Code of 1942, Art. 1224, par. 2, has joined this group. The Soviet Supreme Commission on Arbitration, award of Jan. 9, 1923, tr. *Auslandsrecht* IV (1923) 305, allowed depreciation damages for delayed payment. Bloch, "Zur Frage der Währungsstabilisierung und der Aufwertung im Sovietrecht," *Ostrecht* 1927, 249, 256, cites a similar award of May 29, 1923 and a judgment of the Ukrainian Supreme Court of Sept. 29, 1923 to the same effect.

14. *Infra*, sec. 24 I.

for interest claims,[15] but this commendable principle is unknown to the common law.[16]

II. Restrictions on Interest—Usury [17]

Restrictions on interest have been known from time immemorial. There is, in the early phases of money economy, a natural aversion to interest, resulting from the lack of an organized market for goods and services which in an advanced economy enables the debtor to earn money on the principal. As is well known this aversion was largely responsible for the religious anti-interest dogmas, which in the Middle Ages crystallized in a definite canonical prohibition of any interest.[18] This radical doctrine has been replaced in the European countries by maximum interest laws—a policy well known in ancient law, and particularly in Roman law.[19] In a burst of economic liberalism,

15. French Civil Code 2277 [5 years]; German Civil Code 197 [4 years]; Italian Civil Code [of 1942] 2948 [5 years]; Spanish Civil Code 1966 n. 3 [5 years for "periodical performances"].

16. There is, however, a different kind of special time limitations on interest, 36 A.L.R. 1085 (1925).

17. The following discussion is intended as a juridical contribution, limited by the objective and scope of the present volume, to a matter of the most varied economic, legal, philosophical, theological, and historical implications. Recent bibliographies are appended to *Encyclopedia of the Social Sciences*, "Usury" (1935); *Handwörterbuch der Staatswissenschaften* VIII (4th ed., 1928) "Wucher"; Hug, *Wucher im Schweizerischen Strafrecht* (Switzerland, 1937). In the legal field the concept of usury has been expanded beyond the bounds of monetary transactions. See Dawson, "Economic duress and the fair exchange in French and German law (III) Usury," 12 Tulane L. Rev. 42. (1937)

18. Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* I (1874), II (1883); G. O'Brien, *An Essay on Medieval Economic Teaching* (1920) 159; for England, Holdsworth, *A History of English Law* VIII (1925) 100; for Germany, Max Neumann, *Geschichte des Wuchers in Deutschland* (1865). Ryan, *Usury and Usury Law* (1924), frequently cited in American writings, is unscientific and is particularly unsatisfactory in the legal field. An interesting statement on the early English law of usury is found in *United States v. Metal Co.*, 86 F.Supp. 533 (D.N. J., 1949).

The present writer is indebted to Professor Peake, formerly of the Chinese Department of Columbia University, for the following information. In Chinese law there seems never to have been a prohibition against taking interest. To be sure, money economy had developed very early in China. A maximum interest of 3 per cent monthly existed during the first two centuries A.D. and of 6 per cent in a later period. A more enduring limit was to the effect that the whole of the interest must not exceed the amount of the principal.

19. It appears as early as the Twelve Tables (5th century B.C.); Girard, *supra*, n. 3, at 548.

maximum-interest laws were abrogated by the great majority of the European countries during the second part of the nineteenth century, by England in 1854,[20] by German in 1867,[21] and by Italy through omission of interest limitations in the Civil Code of 1865.[22] France in 1886 abrogated maximum interest laws in commercial matters,[23] but not until 1918 was the abrogation made general.[24] Some residues of the former view remain, such as provisions to the effect that promises to pay interest above a certain rate must be in writing,[25] a rule which also appears in American statutes,[26] or that the promisor has a non-barrable right to give notice of termination to his creditor after the expiration of a certain period fixed by the law regardless of the period contracted for.[27] In addition, stipulation of interest upon interest (compound interest, anatocism) is practically forbidden.[28] These restrictions are comparatively of minor importance.

20. 17 and 18 Vict., c. 90 (1854).

21. Act of Nov. 14, 1867, *Bundesgesetzblatt* 1867, 159. This enactment of the "North-German Confederation" *(Norddeutscher Bund)* was taken over, in 1871, like the other enactments of the Confederation, by the German Reich.

22. And by the Netherlands, Sweden, Belgium and other countries, R. Schmidt in *Vergleichende Darstellung des Deutschen und Ausluendischen Strafrechts* VIII (1906) 171. As to Spain, see *infra*, n. 29.

23. Law of Jan. 12, 1886, *D.P.* 1886 IV 32.

24. Law of April 18, 1918, *D.P.* 1918 IV 188. But see *infra*, p. 162. The revolutionary legislation had done away with maximum interest, but the latter was reestablished by a law of Sept 3, 1807. Duvergier, *Collection des Lois* XVI 176, *cf.* Capitant. "La répression de l'usure", *D. H. Chronique* 1935, 61.

25. Italian Civil Code of 1865, Art. 1831, par. 4, (the Code of 1942, Art. 1284, par. 3, is similar) was remarkably construed by the Cass., July 3, 1926, *Corte di Cassazione* 1926, 1362, where the court points out that art. 1831 purports to compel the money-lender "to show who he is and to confront public opinion".

Giving a promissory note on a sum including the capitalized interest was held, by the court, not to comply with the rule of art. 1831. Stipulation as to the rate of interest must also be in writing under the French Civil Code 1907 par. 2, a provision interpreted to the same effect as the Italian Planiol-Ripert, *Traité Pratique de Droit Civil Français* XI (1932) 434.

26. *Infra*, p. 166, ns. 47, 49.

27. German Civil Code 247; Italian Civil Code of 1865, Art. 1832. This rule has been adopted by the French decrees of July 16 and Aug. 28, 1935, *D.P.* 1935 IV 188 and 259. In Massachusetts (*General Laws 1942*, c. 140, § 90) the debtor of a loan smaller than $1000, the interest of which exceeds 18 per cent, has the power to terminate the loan prematurely upon tender of the principal plus interest at 18 per cent for at least 6 months.

28. German Civil Code 248; Swiss Law of Obligations 105, par. 3; 314, par. 3. The rule against capitalization of interest was known to Roman law, see Girard, *supra*, p. 157, n. 3, at 550; Buckland, *A Text-*

However, the laissez-faire policy in relation to interest did not fare too well and there soon developed a tendency to meet the ensuing abuses with new types of usury laws. Modernization of the arithmetical yardstick for lawful interest was undertaken by France in 1935 by attaching the stigma of usury to an interest rate over one-and-one-half times the average interest rate charged by bona fide creditors under conditions involving the same risk. Charging usurious rates is punishable under the law by fine and, in the case of repetition, by imprisonment; moreover the debtors may recover the usurious portion of interest.[29] The use of the criterion of "normal risk" which might very well fit into insurance law seems rather unfortunate on this score, especially if one considers the possibly grave consequences of a usurious transaction.

A greater step away from traditional maximum interest law was taken by the English Money-Lenders' Act, 1900.[30] The Act is directed solely at professional money-lenders and provides for the reopening of their transactions by the Court in cases where the interest or the amount charged for expenses is "excessive" and "the transaction is harsh and unconscionable or is otherwise such that a court of Equity would give relief"; in such cases the court has power to reform the contract.[31] The Money-Lenders' Act, 1927,[32] besides subjecting money-lenders to an expensive license and to elaborate supervision, establishes a presumption

book of Roman Law (2d ed., 1932) 465. As to Anglo-American law, see Williston, *Contracts* (rev. ed., 1937), sec. 1417; Chitty's *Treatise on the Law of Contracts* (19th ed., 1937) 929. Compound interest is sometimes imposed as a punitive measure upon trustees. A. Scott, *Trusts* (1930) 207.2.

29. Decree of August 8, 1935, *D.P.* 1935 IV 225, see Capitant, *D.H. Chronique* 1935, 61. Spain, which by the Act of March 14, 1856, no. 218, *Colleccion Legislativa* 1856 I 357, had abrogated the statutory maximum interest rate, prohibited by the law of July 23, 1908, 136 *Boletin de la Revista General de Legislación y Jurisprudencia* 738, the stipulating of interest above the "normal" rate and "obviously disproportionate" according to the circumstances. By a judgment of Jan. 30, 1917, 139 *Jurisprudencia Civil* 201, the Spanish Supreme Court declared that a rate of 8 per cent was normal. Seral, annotation to the writer's *Teoría Jurídica del Dinero* (1929) 135.

30. 63 & 64 Vict., c. 51 (1900). See the thorough investigation by Orchard, *Money-Lending in Great Britain* (Russell Sage Foundation, *Small Loan Series*, 1933).

31. The Indian Usurious Loans Act of 1918 (Act X of 1918) is similar. A Summary in Ryan, *Usury and Usury Loans* (1924) 219.

32. 17 & 18 Geo. V, c. 21 (1927) as amended by 19 & 20 Geo. V, c. 23, § 145(2) (c) (1929).

of excessiveness in case interest is more than 48 per cent annually.[33] There is no clear-cut limitation.

By employing such equity notions as "excessive", "harsh" and "unconscionable", the English Acts exhibit a certain kinship with the otherwise quite disparate German usury legislation which includes, besides "flagrant excessiveness" [34] of the creditor's profit, the "exploitation of another's penury, lavishness of inexperience"; where such conditions exist the transaction is entirely void. There is no power of reformation in the court. From the outset the debtor does not have to pay any interest and it is even controversial whether, or to what extent, the sum lent is simply forfeited to the borrower.[35] Moreover, the usurer is subject to both imprisonment and fine and sometimes to loss of civil rights, an unusual and degrading punishment.[36] This whole legislation is fraught with elements of a political and emotional nature, reflecting the violent anti-liberal swing inaugurated by Bismarck at the end of the seventies and distorting the sound core of the new legislative concept, *viz.*, the stress upon penury in the definition of usury.[37] Because of its excessiveness, the German legisla-

33. The 48 per cent rule does not seem to be very effective. See *Reading Trust, Ltd.* v. *Spero*, [1930] 1 K. B. 492 (C.A., 1929) [80 per cent allowed; highly speculative and profitable venture]; *Parkfield Trust, Ltd.* v. *Dent*, [1931] 2 K.B. 579 (K. B., 1931) [160 per cent allowed; circumstances not given]. On the other hand, see *Verner-Jeffreys* v. *Pinto*, [1929] 1 Ch. 401 (C.A., 1928) [48 per cent interest in addition to bill of sale for furniture which gave ample security, held unconscionable]; *Mills' Conduit Investments, Ltd.* v. *Leslie*, [1932] 1 K.B. 233 (C.A., 1931) [interest exceeded 48 per cent; entry of judgment refused in spite of borrower's consent].

34. A more exact translation would be "receiving financial profit (*Vermögensvorteile*) or promises of financial profit, exceeding the value of the consideration given to such an extent that, under the circumstances of the case, the profit is flagrantly disproportionate (*in auffälligem Missverhältnis*) to the consideration. . . ."

35. See, *e.g.*, Staudinger, *supra*, n. 1, at I 593, where the German extension of the usury concept to non-monetary transactions is expounded. Cf. on this also Davison, *supra*, n. 17, at 48. Virtually the same broad conception appears in the Swiss Law of Obligations, Art. 21, giving, however, the debtor in a usurious loan the right to annul the contract within a year's time and to have his performance restored. A Belgian decree of March 18, 1935, likewise practically adopts the German definition, but only as to loans and confines the power of the court to a reduction of the debtor's performances. *Bulletin Usuel des Lois* 1935, 460.

36. German Penal Code 302a-302e. This legislation was inaugurated in 1880, see R. Schmidt, *supra*, n. 22, at 181 with ample references to the violent parliamentary debates.

37. The punitive German conception has to a considerable extent been

tion has attained only a limited actual significance; the records show comparatively few cases applying the new provisions.[38] Juridically, Soviet law belongs to this group inasmuch as it starts with a broad usury concept emphasizing exploitation of extreme penury; it is characteristic of the Soviet legal system that the public prosecutor and other agencies of the government are under a duty to cooperate in, and even to initiate, the disclosure and annullment of the usurious transaction.[39] Exceeding the maximum interest rate is punishable by imprisonment or fine. Similarly punishable is the lending of the means of production or cattle at a rate flagrantly over the customary in exploitation of the need or the embarrassed situation of the borrower, a provision obviously influenced by German law.[40]

Violation of maximum interest laws on the one hand and of enactments of the German-Soviet type on the other, are sometimes contrasted as "legal" and "moral" usury. This nomenclature is not commendable. The term "moral" usury should be confined to the moralist appraisal as explained especially in theological literature. In juridical contemplation any action violating the usury law is legal usury. A better distinction would be perhaps between the arithmetical (or "formal") and the circumstantial (or "material") conception of usury.

The difficulties inherent in any type of usury law appear most strikingly in periods of heavy deflation (contraction of currency), a typical sequel of grave inflation. After November, 1923, when

followed by the Italian Penal Code of 1931, Arts. 643, 644. Punishment is harsh, but this is to be expected because of the general severity of Fascist penal law. Even American courts in usury cases tend to stress the significance of the penury element, although there is no legislative basis for this. *People* v. *Silverberg*, 160 N.Y.S. 727 (1915), *aff'd* 171 App.Div. 914, 155 N.Y.S. 1132 (1915); *Schaidelt* v. *Llewellyn Realty Co.*, 177 N.Y.S. 529 (1918); *Cotton* v. *Cooper*, 209 S.W. 135 (Tex.Com.App., 1919); *Salvin* v. *Myles Realty Co.*, 227 N.Y. 51, 124 N.E. 94 (1920); *McWhite* v. *State*, 143 Tenn. 222, 226 S.W. 542 (1921); *Tenn. Finance Co.* v. *Thompson*, 278 F. 597 (C.C.A. 6th, 1922); *Jenkins* v. *Moyse*, 254 N.Y. 319, 172 N.E. 521 (1930).

38. Compare, *e.g.*, the citations in the Commentaries of the Civil Code (Standinger; *Kommentar der Reichsgerichtsräte*) at § 138, par. 2; in the Commentaries of the Penal Code (Ebermayer-Loebe-Rosenberg); in the annual reports of the *Jahrbuch des Deutschen Rechts* at § 138, par. 2 of the Civil Code. In appraising the number of cases, one has to take into account the wide scope of the German usury conception.

39. See Schoendorf, "Neuerungen des Zivilgesetzbuchs Sowjetrusslands", *Z.A.I.P.* 1928, 68 and 90.

40. *The Penal Code of the Russian Socialist Federal Soviet Republic, Text of 1926 with Amendments up to 1932* (London, 1934) Art. 173.

the great German inflation ended, the following rates were deemed "reasonable" and "very moderate" *(sic)* by the *Reichsgericht:*[41] 6% *daily* from Nov. 2, 1923, until Dec. 10, 1923; 1% *daily* from Dec. 11 until Dec. 31, 1923; 30% annually from Jan. 1 until June 30, 1924; 24% annually from July 1 until Sept. 30, 1924; 18% from October 1 until Dec. 31, 1924; 12% for 1925. These and higher[42] rates were not only held lawful by the courts, but were granted as implied conditions of contract between banks and their customers.[43] The *Reichsgericht* pointed out that the rates included the necessarily high "risk premium" against further depreciation of the mark, a premium which after the beginning of stabilization was justifiable in view of the uncertainty of the lasting effect of the stabilizing measures.[44] It does not appear that the usury laws were of any help in this situation.

III. American Maximum Interest Legislation

The United States[45] and Canada[46] seem to be the only great countries of Western civilization which still cling to the maximum

41. Judgment of Sept. 18, 1929, *J.W.* 1929, 3490.

42. The customary lending interest rate was indicated as 10 percent daily from Nov. 15 until Nov. 30, 1923, 6 percent and later 3 percent to 1 percent daily to Dec. 31, 1923; 1 percent daily from Jan. 1924. *Reichsgericht*, Feb. 19, 1927, *Bank-Archiv* XXVII (1928) 276; Jan. 30, 1929, *Bank-Archiv* XXVIII (1929) 280. See also Bresciani-Turroni, *The Economics of Inflation* (tr. Sayers, 1937) 360.

43. In addition to the cases cited *supra*, see *Reichsgericht*, April 22, 1926, *J.W.* 1926, 2683; Oct. 1, 1927, *R.G.Z.* 118, 165; April 6, 1932, *ibid.* 136, 56; *Reichsgericht*, Oct. 21, 1924, *Entscheidungen in Strafsachen*, LVIII 321; App. Berlin *(Kammergericht)*, Oct. 24, 1924, *Bank-Archiv* XXIII (1924) 249; March 21, 1929, *J.W.* 1929, 2164, no. 3. Much pertinent material is offered by the opinions rendered to the courts by the Berlin Chamber of Commerce and published in *Mitteilungen der Handelskammer Berlin*, see, *e.g.*, 1928, 1133; 1929, 613.

44. Judgment of Jan. 30, 1929, *Bank-Archiv* XXVIII (1929) 280.

45. Horack, "A survey of the general usury laws," *Law and Contemporary Problems* VIII (1941), 36, with chart covering all states. The article is not free of inaccuracies, *e.g.*, regarding Massachusetts. The State laws are also listed, with an eye to banking transactions, in C.C.H. (Commerce Clearing House) *Banking Laws, State Service* II, #12,601.

46. The Canadian Money-Lenders' Act, *Revised Statutes of Canada* (1927), c. 135, §§ 6 and 7, establishes a 12 percent maximum rate on negotiable instruments, contracts, or agreements, and empowers the court to relieve the debtor of any excess. Section 4 exempts small loans from the operation of the statute. A separate statute, 24 & 25 Geo. V, c. 56, amending § 111 of the Loan Company Act, *Revised Statutes of Canada* (1927), c. 28, established 2½ per cent per month as the maximum rate chargeable by any company chartered under

interest principle. Maximum interest statutes prevail in almost all of the States—Maine and, regarding loans above a thousand dollars, Massachusetts, being the main exceptions.[47] The maximum interest rates vary in general[48] from six to twelve per cent.[49]

The effectiveness of these enactments, however, is greatly impaired on two counts. First, the penalties for contravention are far from being deterrents. Some statutes merely provide for forfeiture of the usurious amounts,[50] thereby almost inviting usury. The commonest penalty is forfeiture of the whole interest owed[51]—not a serious threat, either. Criminal punishment is ordained by about one-third of the states, but in New York and some others it is used only for certain extraordinary offenses, and imprisonment, when provided, is not mandatory but

this act. Corporate debtors are not prevented from pleading usury.

Maximum interest acts exist also in some Swiss Cantons. See Hug, *supra*, n. 17, at 60.

47. Maine, *Revised Statutes* (1944) §§ 55–189 [writing required for a rate exceeding 6 per cent.]; Massachusetts, *General Laws* (1931) c. 107, § 3 [same].

48. Except for the Rhode Island maximum rate, which is as high as 30 per cent. R.I. Gen. Stat. 1923, c. 228, § 7.

49. See, *e.g.*, California: Const., Art. XX, § 22 [10 percent; writing required if exceeding the legal rate of 7 percent]; Illinois: Rev. Stat. (1947, Bar ed.), c. 74, § 4 [7 per cent; writing required if exceeding the legal rate of 5 percent]; Massachusetts: Gen. Laws (1931), c. 140, § 90, as amended [18 per cent for loans up to $1000]; Missouri: Rev.Stat. (1939), c. 15, § 3227 [8 per cent; writing required if exceeding the legal rate of 6 per cent]; New York: General Business Law, §§ 370, 371 [6 per cent].

In some States the remarkable step has been taken to entrust competent administrative bodies with the task of fixing the maximum interest rate according to changing conditions. *Indiana*; *Burns' Statutes Ann.* 1935, § 18-3002; *Iowa: Code* (1946), § 536.13; *Massachusetts: General Laws* (1931), c. 140, § 100; *Wisconsin: Statutes* (1937 ed.), § 214.07(2). The method of adapting legal interest to official discounting rates, *supra*, n. 0, is similar.

50. Massachusetts: Gen. Laws (1942), c. 140, § 90, as amended—*supra*, n. 49—[creditor cannot recover excess over 18 per cent]; Missouri: Rev. Stat. (1939), c. 15, § 3231 [excess plus reasonable attorney's fee can be recovered]; Pennsylvania: Purdon's Penna. Statutes, Title 41, § 4 [only the excess over 6 per cent can be recovered within six months].

51. California: Gen. Laws (Deering, 1937), Act 3757, §§ 2 and 3 [entire interest forfeited, recovery of treble interest within year after payment]; Illinois: Rev.Stat. (1935), c. 74, § 6 [entire interest forfeited]; Missouri: Rev.Stat. (1919), c. 1, § 3229 [usury avoids pledge or mortgage on personal property given as security for loan; as to interest *supra* n. 50]. New York: General Business Law, § 373, is more severe [the loan is void; the usurer cannot recover the principal].

is left to the discretion of the court.[52] Second, numerous exceptions have been admitted by the several legislatures. Banking transactions are frequently placed under more lenient provisions; [53] and generally—a significant feature of American law—corporations are prevented from pleading usury altogether [54] on the theory that a corporation does not need such protection.

Courts have stressed rather than counteracted that leniency. In a famous New York case the borrower, a small real estate owner, upon the demand of the prospective lender, formed a one-man corporation to which he transferred his real estate. The corporation then received the loan, having apparently no other function. It was held by a unanimous court that usury could not be pleaded.[55] No wonder that any New York money lender desirous of charging usurious interest makes the granting of the loan dependent upon the fact that a prospective debtor transforms himself into a corporation.

The defense of usury has also been impeded judicially by increasing the debtor's burden of proof [56] and by the assumption of the rule that in case of doubts, that is, in borderline situations, the contract should be deemed nonusurious.[57] Where the loan, through domicile of the parties, place of contract or for other reasons is connected with several states of different usury policies, the commodious view has been taken that the court will apply that state law which is most favorable to the maintenance of the transaction.[58] Moreover, while in other countries courts

52. N. Y. Penal Law, §§ 2400, 1937.

53. California, Const., Art. XX, § 22, exempts banks from the operation of the general usury law. New York: see *infra*, n. 70.

54. See, for instance, N. Y. General Business Law, § 374.

55. *Jenkins* v. *Moyse*, 254 N.Y. 319, 172 N.E. 521 (1930), Chief Justice Cardozo on the bench. Contrast with this case *Shapiro* v. *Wilgus*, 287 U.S. 348, 53 S.Ct. 142, 77 L.Ed. 355 (1932), where the Supreme Court of the United States held, per Mr. Justice Cardozo, that an individual could not obtain the benefits of an equity receivership by incorporating.

56. See Restatement, *Contracts* (1932), § 526, special note: "It seems . . . true that the severer the consequences of usury under a local statute, the more inclined the courts are to withdraw doubtful cases from the operation of the statute." And the *New York Annotations* to this Restatement (1933), § 526: "Due to the harshness of the New York usury law the defense is not favored, and in case of doubt a rather heavy burden of proof is thrown upon the person asserting that a bargain is usurious."

57. E.g., *Lubbock Hotel Co.* v. *Guaranty Bank & Trust Co.*, 77 F.2d 152 (C.C.A. 9th, 1935); *In re Zemansky*, 39 F.Supp. 628 (S.D.Cal., 1941).

58. In addition to the *Lubbock* case, see *Green* v. *Northwestern Trust*

are rather inclined to impose their own "public policy"—which might include usury policy—on foreign transactions,[59] such disposition is conspicuously absent in this country.[60] Here is a characteristic example. When a New York citizen, a railroad employee, received a loan of $36.85 from a New York money lender, he was charged, after two months, with $60.50, a transaction usurious under New York law. However, the borrower had given to the lender a promissory note in blank which was filled in by an agent of the lender *in Maine.* This feature of the transaction was indeed opprobrious, but a New York appellate court, on the contrary, deemed it a reason to hold the contract valid because this was, in the opinion of the court, a Maine contract and Maine had no usury law. The court used strong language in support of its conclusion, as if attempting to convince itself.[61]

Co., 128 Minn. 30, 150 N.W. 229 (1914). Under the same policy the courts allow the parties to select for their contract the most lenient law among several eligible. *Sceman* v. *Philadelphia Warehouse Co.*, 274 U.S. 403, 47 S.Ct. 626, 71 L.Ed. 1123 (1927). The underlying principle is clearly stated in *Bigelow v. Burnham*, 83 Iowa 120, 123, 49 N.W. 104 (1891), to the effect that in usury cases the general Conflict rule is "modified or softened . . . as a concession to trade and commerce."

59. Thus *Reichsgericht*, Feb. 20, 1880, *R.G.Z.* 1, 59; Jan. 29, 1881, *R.G.Z.* 5, 254, 260, regarding prohibition of contracting for compound interest; Austrian Supreme Court, Aug. 16, 1889, Glaser-Unger, *Sammlung von Zivilrechtlichen Entscheidungen* XXVII, 519, no. 12864, regarding interest on recorded mortgages. French courts, however, in the case of loans made outside of France, do not require the observance of French maximum interest. Cass., Feb. 19, 1890, *J.D. Int.* 1890, 495, and decisions of lower courts cited by Surville, *Droit International Privé* (7th ed., 1925) 366, n. 1. Generally, see the writer's *Principles of Private International Law* (1943) sec. 12.

60. See *O'Toole* v. *Mepsenbury*, 251 F. 101 (C.C.A. 8th, 1918): "It is not, generally speaking, against public policy to enforce a contract usurious at the forum but valid at the situs." In *Rooney* v. *Southern Building and Loan Ass'n*, 119 Ga. 941, 47 S.E. 345 (1904), concerning an Alabama contract, the court passed over the usury defense on the ground that the Alabama usury law was not proved and the Georgia usury law would not be applied, the contract being not "clearly usurious on its face." A suggestion of the public policy notion may be found in *Phinney* v. *Baldwin*, 16 Ill. 108 (1854) [the court may refuse interest agreements valid under the law of the contract, but excessive under the law of the forum], and *Sime* v. *Norris*, 8 Phila. 84 (Pa. Sup. Ct. at nisi prius, 1871) [California contract valid under California maximum interest law, but enforced only within the limit of the California "legal interest" rate]. Public policy is more potent in the small loan field. *Infra*, n. 67.

61. *Thompson* v. *Erie R. Co.*, 147 App.Div. 8, 131 N.Y.S. 627 (1911).

In vindication of this trend of decisions it may be said that it reflects the hesitant, inconsistent and motley state of American usury legislation. The tenets of the classical school of economics as expounded by Bentham in his famous *"Letters in Defense of Usury"* (1787) are still a powerful influence. An outdated belief in "freedom of contracts" and in the futility of legislative inroads on interest rates persists with legislators and judges. On the other hand, there is a feeling that something has to be done about usury. The American business community is unwilling to submit to the sweeping tests of the "circumstantial" type of usury legislation,—German model—; hence the indecision, faltering and confusion in the field.[62] It would be rash, however, to conclude that the existent usury legislation is entirely ineffective. It is certainly being observed by those who for reasons of decency or because of their position in public life do not wish to evade the law.

Under Federal law maximum interest rates have been prescribed for national banking and credit institutions[63] which thereby are taken out of the medley of state laws.

IV. Small Loan and Pawnbrokers Legislation

Meandrous though the above picture of the American usury situation looks, one of its main characteristic elements has not yet been mentioned, the Small Loan Acts.[64] While retaining the maximum interest feature and borrowing from English law the exclusive concern with the money-lending business, they have added important new points: (1) the licensing and supervisory feature—adopted in turn by England in 1927—and (2) the re-

62. Without consideration of this background, any attempt at analyzing the American usury cases, and particularly their Conflict aspects, is hopeless. Even recent discussions of the pertinent Conflict cases (*e.g.* by Rabel, *The Conflict of Laws* II (1949) 468) indulge in purely conceptual analysis. Not only does this method—so often found in the Conflicts field—fall short of explaining the subject scientifically; it also deprives the practitioner of the most important tool of prognostication.

63. As to national banks see Act of June 16, 1933, § 25, 48 Stat. 162 at 191, 12 U.S.C. 85. Numerous other federal credit institutions are by federal law likewise placed under special interest restrictions. It may suffice to mention the Farm Credit Administration [loans to cooperative associations], Act of June 15, 1929, § 8, 46 Stat. 11 at 14, 12 U.S.C. 1141f., and the U. S. Housing Authority [loans to public housing agencies], Act of Sept. 1, 1937, § 9, 50 Stat. 888 at 891, 42 U.S.C. 1409.

64. Hubachek, "The development of regulatory small loan laws," *Law and Contemporary Problems* VIII (1941) 108; Sullivan, "Administration of a regulatory small loan law," *ibid.* 146.

striction upon "small" loans, ordinarily up to three hundred dollars. Within this ambit the money-lender is allowed a high interest rate, on the average two and one-half to three-and-one-half per cent monthly, making the business profitable despite the considerable overall expenses. Still the lender has to take out a license and is placed under permanent government supervision. Penalties are considerably stricter than in the case of the maximum interest laws. Under almost all of the State laws wilful violation of small loan laws is a misdemeanor and under the great majority of them it renders the loan void or not enforceable. The aim of this legislation is primarily the elimination of the "loan shark" who exploits the needy and helpless by various extortionist and criminal schemes.[65] The great majority of States have passed such enactments, many accepting as a basis the Uniform Small Loan law, drafted in 1916 by the Russell Sage Foundation, a philanthropic institution. The results of the legislation seem to be satisfactory.[66] The indulgent attitude shown by courts toward the general usury law is not observable with respect to the Small Loan Acts.[67]

However, not even in the field of small loans have the States been contented with one type of enactments. In addition to Small Loan Acts, pawnbroker statutes have often been adopted.[68] While they, too, allow interest rates beyond the general maximum and provide for licensing and supervision, they have features of their own. Historically they are the oldest type of pertinent legislation and have long been a familiar institution in Continental Europe.[69]

65. See the articles by Nugent and Kelly, in *Law and Contemporary Problems* VIII (1941) 3 and 88.

66. Cf. Hubachek, *supra*, n. 64, at 125. On the frustrated efforts of New York money lenders to evade the New York Small Loans Law by moving out of the State and doing their business by mail, see Maguire, *The Lance of Justice* (1928) 124.

67. Thus, small-loan contracts, valid under their "proper law," have been invalidated, wholly or in part, as incompatible with the small-loan legislation of the forum [resort to "public policy"] in *Personal Finance Co. of Council Bluffs* v. *Gillinsky Fruit Co.*, 127 Neb. 450, 255 N.W. 558, 256 N.W. 511 (1934), cert. denied, 293 U.S. 627, 55 S.Ct. 348, 79 L.Ed. 714 (1935); *Continental Adjustment Corporation* v. *Klause*, 12 N.J. Misc. 703, 174 A. 246 (1934); *Folsom* v. *Continental Adjustment Corporation*, 48 Ga.App. 435, 172 S.E. 833 (1934).

68. Raby, *The Regulation of Pawnbroking* (1924). For New York, cf. General Business Law, §§ 40–52.

69. See *Rechtsvergleichendes Handwoerterbuch* ed. by Schlegelberger, V (1935) "Pfandrecht" 620. The discussion of Raby, *supra*, n. 68, at 27, is erroneous on this point.

Ascertaining the various interest maxima is a troublesome task even for each particular State.[70]

While it must be admitted that American Small Loan legislation constitutes a valuable contribution to the modern fight against usury, there can be little doubt that the structure of American usury law is highly defective for more than one reason. Perhaps the defects of the law are of greater concern to the juristic conscience than to the public and the authorities. There is no reform movement.[71] The feeling seems to be that the possible patterns of legislative intervention have been exhausted. And certainly with the development of an inflationary money plethora the problem has temporarily lost its urgency.

Section 12

DEBTS UNDER FLUCTUATING CURRENCIES

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I. The Immutability of the Nominal Amount

In the analysis of legal problems connected with fluctuating currencies[1] one must distinguish between depreciation *(Ent-*

70. For instance, New York State legislation contains the following regulations of interest rates apart from general usury law: *Pawnbrokers* 1% to 3% monthly (*General Business Law*, § 46); *Small loans*, loans up to $300 given by professional money lenders 2–2½% monthly (*Banking Law*, § 352); *Credit Unions*, 1% monthly (*Banking Law*, § 453(5)); *Personal Loan Departments of Banks*, maximum 12% (*Banking Law*, § 108 (2)); *Loans Secured by Assignment of Future Wages*, 18% (*Personal Property Law*, § 42(5)); *Banks and Trust Companies, Private Bankers, Industrial Banks, Investment Companies*, forfeiture limited to interest, special Statute of Limitations (*Banking Law*, §§ 108(1), 173, 293a, 510a); *Demand Loans Exceeding $5,000 on Collateral Security*, no limit; writing required if interest exceeds 6%, unless the creditor is a bank or a trust company (*General Business Law*, § 379; *Banking Law*, § 108(3). This multiformity is by no means uncommon.

71. Except, perhaps, in the field of small loan legislation. Gisler, in *Law and Contemporary Problems* VIII (1941) 183.

1. See Hubrecht (later writing under the name of Hubert), *La Dépréciation Monétaire et l'Exécution des Contrats. Stabilization du Franc et Valorisation des Créances* (1928); Guisan, *La Dépréciation Monétaire et ses Effets en Droit Civil* (1934); Gény, "Cours légal et cours forcé en matière de monnaie et de papier-monnaie," *Revue Tri-*

wertung) and devaluation *(Abwertung)*. Depreciation is an economic phenomenon; it is loss of purchasing power in the market of exchange or goods or both. Until its termination it is a continuous and ever changing process. Devaluation is a legislative act, the fixation of the ratio between gold and the monetary unit on a lower level, designed to create a lasting situation. When President Roosevelt on March 6, 1933, suspended gold redemption of American paper money, the dollar, shaky before, began to *depreciate*. *Devaluation* came on January 31, 1934; it was the end of depreciation.

Despite their striking disparity, depreciation and devaluation are often, if not ordinarily, confounded in legal discussion and elsewhere. Juridically that indiscrimination is to some extent understandable, because depreciation and devaluation are equally irrelevant with regard to debts. In fact, devaluation purports to maintain the legal integrity of debts in spite of the lower level of the monetary unit. In other words, it purports to ease the debtor's financial burden without disturbing the legal substance of the debt. There was practically no doubt that after the devaluation of the dollar in 1934 a debtor owing a thousand dollars before that date had to pay a thousand dollars and no more, notwithstanding the lower gold value of the dollar. A like attitude was taken by the French when the franc was devalued in 1926 and 1928. It is a very old story: debasement of coin, so conspicuous in French history up to the eighteenth century but actually practiced everywhere since antiquity, invariably carried with it *juridical* maintenance (as opposed to *financial* shrinkage) of debts contracted in terms of that coin. For the common law a firm basis for this doctrine was laid by the case of Mixt Moneys (1604).[2] Under the pressure of the Irish War Queen Elizabeth

mestrielle de Droit Civil, 1928, 5; Henggeler, "Die Abwertung der Schweizerfrankens und ihr Einfluss auf die zivilrechtlichen Verhältnisse," *Zeitschrift für Schweizerisches Recht* 1937, 158a; Rosset, "La dévaluation du Franc Suisse et ses effets en droit civil," *ibid.*, 1937, 260a; Piret, *Les Variations Monétaires et Leurs Repercussions en Droit Civil Belge* (1935); Eckstein, *Geldschuld und Geldwert im Materiellen und Internationalen Privatrecht* (1932), and the writings on revaluation, *infra*, p. 217, n. 67.

2. *Brett* v. *Gilbert*, 2 State Trials 114, Davis 18, 80 Eng. Rep. 508 (Pr. C.). This case has been censured from a metallistic point of view by Eder in his article on "The gold clauses in the light of history," 23 Geo. L. J., 722, 731 (1935). Still Mr. Eder's arguments bear only upon the King's power to debase the coin, hence on a problem of old English constitutional law, and not on the question of how a valid devaluation affects existing debts. They also show that there was later some criticism of the *Mixt Moneys* case. There is no disagreement, however, regard-

had put into circulation debased ("mixt") shillings, sixpences and other coins, decrying at the same time the "current" coins of like denomination. The plaintiff Gilbert, who, prior to the enactment, had lent one hundred pounds sterling to the defendant Brett, refused to be content with the same amount in "mixed" money tendered him by Brett. Thereupon the court by a most thorough and erudite argument held for Brett "although at the time of the contract and obligation made . . . pure money of gold and silver was current within this Kingdom . . . yet the mixed money being established in this Kingdom before the date of payment may well be tendered in discharge of the said obligation and the obligee is bound to accept it." Immutability of the nominal amount has since been the law of England,[3] with no distinction between depreciation and devaluation.[4] In the United States the same theory was authoritatively enunciated by the Supreme Court in the Legal Tender Cases.[5] A recent and striking application of the nominalistic principle occurred

ing the fact that the debasement of coins is generally undesirable and that the English constitutional rule changed in the eighteenth century. For another expression of the nominalistic doctrine in the common law, see *Pong* v. *Lindsay*, 1 Dyer, 82 b, 73 Eng. Rep. 178 (1552 53).

3. Cf. *The Baarn*, [1933] p. 251, 265 (C. A.), *infra*, n. 55. See also Mann, *The Legal Aspect of Money* (1938) 70 *et seq.*

In *Deering* v. *Parker*, 4 Dall. (Pa.) append. xxiii (1760), 1 L.Ed. 925, the Privy Council made an adjudication which equitably distributed a depreciation loss between creditor and debtor. This was done without any thought of "revaluation," through an arbitrary estimate made necessary by an extremely obscure contract clause. The case carries little weight in England, cf. Mann, 71, much less in this country. However, it offers some historical interest, *infra*, sec. 40, n. 31.

4. The *Mixt Moneys* case deals with debasement, but the analogy of devaluation is obvious.

5. 12 Wall (79 U.S.) 457, 458, 20 L. Ed. 287, by Mr. Justice Strong, *infra*, sec. 42 II. However, a bad error crept into the otherwise convincing opinion. On p. 552 Mr. Justice Strong, referring to the slight debasement of the gold dollar in 1834, *infra*, sec. 41 IV, points out that "the creditor who had a thousand dollars due him on the 31st day of July, 1834 [the day before debasement took effect], was entitled to *a thousand dollars of coined gold* of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent. less in weight and in market value, or *to a smaller number of silver dollars*" [italics the writer's]. In reality, the creditor was never entitled to gold, the choice of the medium of payment being in the debtor. And of course the number of silver dollars to be employed in payments of a given sum was not made smaller by the law of 1834.

An explicit demonstration of the nominalistic principle with an eye to "Continentals" is found in *Holingsworth* v. *Ogle*, 1 Dall. 257, 1 L. Ed. 126 (Pa., 1788).

in *Bates* v. *United States*.[6] Bates had bought securities prior to the 1934 dollar devaluation and sold them afterwards in a higher market. Assessed for the capital gains tax, he objected on the ground that, owing to the devaluation of the dollar his nominal gain was financially non-existent. The court, however, held him liable, as the dollar had remained the same. One may add that no budget could ever stand the strain of a different theory.[7]

In France the nominalistic treatment of debts was considered as early as Pothier to be *l'usage constant dans notre jurisprudence*[8] and was incorporated in the famous Article 1895 of the Civil Code of 1804.[9] Though under the weight of tradition the text of the Code is still couched in terms of debasement and loan and is placed in the chapter on loans, there is no doubt as to its applicability to devaluation and to all debts. Legislatures and courts have invariably clung to that line.[10] The French model

6. 108 F.2d 407 (C.C.A.7th, 1939).

7. For similar reasons the nominalistic rule is compelling in accounting, but there are no cases or authoritative statements thereon. Cf. Bresciani-Turroni, *The Economics of Inflation* (tr. by Sayers, 1937) 274; Sweeny, *Stabilized Accounting* (1936); Schkaff, *La Dépréciation Monétaire et ses Effets en Droit Privé* (1925) 241; Schmalenbach, *Dynamische Bilanz* (4th ed., 1926) 217; Wahle, *Das Valorisationsproblem in der Gesetzgebung und Rechtsprechung Mitteleuropas* (1924) 33; W. Rieger, *Über Geldwertschwankungen* (1938) [strongly advocating a strictly nominalist point of view].

8. Pothier, *Traité du Prêt de Consomption* (*Oeuvres*, V [Siffrein, 1821]), 403, n. 36.

9. "The obligation resulting from a loan in money is always simply for the amount in figures indicated in the contract. If there has been an increase or diminution of specie before the time of payment, the debtor must return the numerical amount lent and must return this amount only in the specie current at the time of payment." On the genesis of art. 1895, see Gény, "La validité juridique de la clause 'payable en or,'" *Revue Trimestrielle de Droit Civil*, 1926, 557; Hubrecht, *supra*, n. 1, at 89.

10. See Lalou, *D. P.* 1924 II 18, 20 with references. There is some academic dispute whether Art. 1895 applies to devaluation and depreciation of *paper money*. This is denied by Hubrecht, 101. Hubrecht, —very much of a non-conformist in French monetary literature—advances the doctrine that nominalism is an "exceptional" rule. But it is even more appropriate for paper money than for coin. His authority is a judgment of a rural court of first resort, the confused arguments of which Mr. Hubrecht himself rejects. (Trib civ. Gap, Mai 5, 1922, *D.P.* 1923 II 17.) Furthermore, he cites gold clause cases, cases of cattle leases (*baux à cheptel*, infra, p. 183, n. 56) and other examples which do not affect the basic principle of Art. 1895.

A narrow interpretation, excluding paper money, was applied by Mixed App. Alexandria, May 19, 1927, *J.D. Int.* 1928, 765, to Art. 577 of the Egyptian Mixt Civil Code, which is almost literally taken from Art. 1895 of the French Code. How-

was literally taken over by the Italian,[11] the Spanish [12] and other Latin codes [13] as well as by the Dutch code.[14] The latter protects specie clauses stipulated in favor of money-lenders who have supplied the debtor with coin of the stipulated kind,[15] an exception which only demonstrates the general prevalence of the nominalistic principle.

Depreciation can affect the nominal amount of the debt even less than can devaluation which officially establishes a new money-gold ratio. In the case of devaluation one might perhaps think of enhancing proportionally the nominal amount of debts according to the lowered ratio of the monetary unit. This would not be possible in the case of depreciation with its ever-changing, uncertain and unofficial rates. Nobody has ventured to assert that the depreciation of the dollar which we have been experiencing since 1939 gives a creditor whose right dates from 1938 a claim for more dollars than contracted for in 1938. As a matter of fact the validity of the nominalistic principle,—"dollar for dollar", "franc for franc" etc.—is so deeply ingrained in public conscience and considered so much a matter of course that it is difficult to find judicial pronouncements of it, at least in domestic cases. Mr. Justice Holmes stated the guiding principle in these words: "Obviously, in effect a dollar or a mark may have different values at different times. But to the law that establishes it, it is always the same." [16] In international relations an additional problem arises, namely, to what extent the country of a creditor has to put up with devaluation ordained, or depreciation allowed by the debtor's country. Even when faced with this difficulty, courts, as will be seen,[17] have almost unanimously recognized the right of the government of the debtor's country to such alterations, and the necessity of giving full effect to the alterations also outside that country.

ever, in the Egyptian legislation, *franc* seems to signify *gold franc*, *infra*, p. 241.

11. Codice Civil of 1865, Art. 1821. Art. 1277 of the 1942 Code squarely proclaims the nominalistic principle. The significance of the latter within the Italian monetary system was pointed out by Ital. Cass., May 30, 1927, *Monitore dei Tribunali* 1928, 91.

12. Spanish Civil Code 1170; Spanish Commercial Code 312.

13. Thus by the Belgian Civil Code 1895, 2199.

14. Art. 1793.

15. *Ibid.*, Art. 1794. This was followed by the Italian Civil Code of 1865, Art. 1822.

16. *Die Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517 at 519, 47 S.Ct. 166, 71 L.Ed. 383 (1926).

17. *Infra*, sec. 24 IV.

However, in the past there was sometimes a nonnominalist doctrine of debt. While the Roman rule stood for immutability of debts,[18] during the Middle Ages a "metallistic" doctrine was applied to loans; [19] that is, the object of a loan was considered to be a definite quantity of silver or gold.[20] But that was a time of monetary chaos, characterized by a multitude of coining potentates, by roughness, lack of uniformity, incessant alterations and re-rating of coins, melting down and emigration of the better types, and generally, by monetary abuses committed by rulers as well as subjects. Therefore, in making payment money was frequently weighed, particularly where considerable amounts were involved.[21] At the same time the object of major debts was customarily articulated, directly or indirectly, in terms of a definite quantity of coined gold or silver.[22] Under such conditions it was a workable and fair rule to have the borrower return the "intrinsic" value of the coin received, even in the absence of an explicit stipulation to that effect. Thus the lender, denied interest for the use of capital under canon law, was at least protected against loss through monetary changes. This medieval proposition was in the nature of a rule peculiar to loans rather than an application of a general monetary theory.[23] Also, there was so much wrangling on principle as well as on detail that a French writer of the fifteenth century calls the controversy *"antiqua res, alta, magna et profunda."* [24] A definite turn toward

18. Ascarelli, *La Moneta* (1928) 4, n. 3, id. *Saggi Giuridici* (1949) 226, n. 5.

19. This has been demonstrated particularly by G. Hartmann, *Über den Rechtlichen Begriff des Geldes und den Inhalt von Geldschulden* (1868), and by Taeuber, *Geld unf Kredit im Mittelalter* (1933).

20. As early as 1200 Pope Innocent III adjudicated an ecclesiastical case on a metallistic theory. See Taeuber 107, 309. The case involved an old impost running in terms of a local type of "denars" which had long disappeared from circulation. Considering the absence of a "recasting" rule, the metallistic decision was a matter of course.

21. Taeuber, 195; the same was true even in England, W. Cunningham, *The Growth of English Industry and Commerce* (5th ed., 1910) I 326, n. 5.

22. Examples in Taeuber 96.

23. On this Taeuber 85 and passim. Taeuber points out that the old metallistic doctrine was derived from the broad Roman conception of *mutuum* (loan); the rule that borrowed wheat or wine had to be restored in the same quantity and quality, having been carried over to coin borrowed. However, behind the legalistic coordination of wheat, wine and coin, there was, of course, an indistinct, commodity-like notion of money, not sufficiently heeded by Taeuber, but well indicated by Ascarelli, *La Moneta* (1928) 10 et seq.; *Saggi Giuridici* (1949) 231 et seq.

24. Joh. Regnaudus (Reynaud) of

the modern conception appeared when, in a more advanced economy, the famous French jurist Molinaeus (1500–1566) developed a clear nominalistic theory based on the notion of *valor impositus*.[25] The case of Mixt Moneys cited Molinaeus approvingly.[26] The metallistic conception of debt definitely lost ground as governments succeeded in improving coinage and finally established monetary systems firmly linked to a precious metal.[27]

The political implications of national systems operated in the same direction. In 1811, when English bank notes were at a discount of about 15 per cent, the House of Commons, on the motion of Mr. Vansittart, resolved that the notes "have hitherto been, and are at this time, held in public estimation to be equivalent to the legal coin of the realm and generally accepted as such. . . ." [28] Lord Canning felt that such a pronouncement was "carrying the license of exaggeration beyond pardonable limits and defeating its purpose by the grossness of the caricature." [29] Yet the resolution was passed by 76 to 24 votes.[30] While Lord Canning was certainly right as far as phrasing of the resolution is concerned the latter expresses the strong sentiment of the necessity to uphold the "pound for pound" rule. At that time the depreciation was relatively mild but the validity of the nominalistic principle was not questioned, either, in the collapse of the "Continentals" during and after the Revolutionary War.[31] Apart from a wholly academic, if historically noteworthy dissent by Savigny,[32] the sway of the nominalistic rule remained unchallenged until the great German inflation of 1918–1923, when the German courts backed by a number of German writers started to revalue the mark debts which had dwindled to a microscopic

Avignon, in the beginning of his tractate, *De Monetis*, here cited from Taeuber, *Molinaeus' Geldschuldlehre* (1928) 11, n. 43.

25. Molinaeus, *Tractatus Commerciorum* [or *Contractuum*] *et Usurarum* (first published in 1546) is primarily in point. According to Taeuber, the historical significance of Molinaeus' doctrine does not consist in his nominalistic tenet, but rather in the fact that Molinaeus was the first to develop a doctrine of debts in terms of a general theory of money. This feature, however, is over-emphasized by Taeuber.

26. *Supra*, n. 2 [80 Eng.Rep. at 513].

27. An important Austrian decree of 1625 still follows, though not consistently, metallistic views, Charmatz, "Die Geschichte der geldrechtlichen Bestimmungen, *etc.*," *Festgabe für Oscar Engländer* (Prague, 1936) 81.

28. Debates of the House of Commons on the Report of the Bullion Committee, May 7–15, 1811, in Hansard, *Parliamentary Debates*, Vols. 19, and 20.

29. 19 Hansard 1118.

30. 20 Hansard 171.

31. *Infra*, sec. 41 I.

32. *Infra*, p. 219.

quantity.[33] Many writers then set "revaluation" over against "nominalism," [34] but this was not exact from the viewpoint of scientific analysis. Revaluation never purported an automatic and direct tie of the monetary unit with the price of gold or with foreign exchange or with internal purchasing power; it merely purported equitable distribution of the depreciation loss between debtor and creditor, replacing one nominal amount by another (namely, by a higher one).[35] In reality nominalism is a prerequisite of revaluation. The phenomenon of depreciation can be seen only against the fixed background which is furnished by the nominalist rule.

So far we have considered only depreciation, devaluation and debasement,—that is, downward movements. Still there have been upward movements in history—actually always correctives of anterior downward trends. We have not found an instance of a legislative measure enhancing the statutory ratio of the monetary unit beyond the prior statutory ratio, but former centuries have witnessed corrective amelioration of coins after heavy debasement.[36] Recent times have also seen appreciation of depreciated currencies.[37] Outstanding is the appreciation of the dollar by more than 100 per cent from 1864 to 1879.[38] A number of similar processes occurred after World War I. The English pound had depreciated about 30 per cent by 1920. And the Dutch guilder fell approximately 25 per cent one time in the same year. But they wholly recovered within a few years. In these cases the market ratio of the monetary unit finally reached the level of the statutory ratio. Where inflation was heavier, stabilization was attained by devaluation on a level between the statutory ratio and the lowest market ratio.[39] Wherever upward developments took place, the burden of debtors who had contracted their

33. *Infra*, p. 206.

34. Particularly Hubrecht and Eckstein, *supra*, n. 1. For full references on revaluation, *infra*, sec. 14.

35. The showing of an adequate standard employable by courts as a basis of revaluation is a crucial test for the opponents of a nominalistic debt theory. They have all failed conspicuously, as can be seen from Hubrecht, 472, and Eckstein, 52. These two writers, probably the two most acute advocates of the non-nominalistic (valoristic," *supra*, p. 17, n. 64) debt doctrine, rely mainly on purchasing power, but only in the sense of an *approximate* standard for *legislation*. The lawgiver, of course, may adopt this or any other standard, *infra*, pp. 205, 222.

36. See *supra*, p. 39, n. 38; *infra*, p. 198, n. 22.

37. See League of Nations *Memorandum on Currency 1913–1922* (1923), Tables, p. 48.

38. *Infra*, sec. 42 I.

39. *Infra*, p. 197.

debts in depreciated (or debased) money was made heavier. Nevertheless, debtors very seldom tried to derive a legal defense from this situation; and where attempts were made they proved unsuccessful. Thus, in an Iowa case of 1934, a mortgagor, threatened with foreclosure, tendered less than the nominal amount on the ground that the dollar had gained in purchasing power since the time of the loan.[40] The court, while "sympathizing" with the mortgagor, rejected his view, saying, "He has cited us no law and we are unable to find any through which we may grant him the relief which he asks." [41]

The trend of history is definitely toward lowering the weight of debts. Says Feavearyear, in his learned History of the Pound Sterling: [42]

> "'*L'or va pis toujours*' says the old French proverb, and it might well be applied, not merely to gold, but to all kinds of money. There is probably some principle deep down in human nature, or in the system which man has constructed for satisfying his wants by producing goods for his market, which secures that those who take a mortgage upon the means of production in order to live in idleness upon the interest shall in the long run be deprived of a portion of the wealth which they lend. . . . The English penny, six of which in the time of the Conqueror would buy a bushel of wheat or ten gallons of ale, will now purchase but one fourth of a loaf or one gill of the smallest beer. The English pound, which Domesday Book recorded as the year's rental of a

40. *Federal Land Bank of Omaha* v. *Wilmarth*, 218 Iowa 339, 252 N.W. 507 (1934). There had been rural riots in the Middle West because of the low grain prices.

41. A strange consequence of dollar appreciation appeared in *The Vaughan and Telegraph*, 14 Wall. (81 U.S.) 258, 20 L.Ed. 807 (1872). The debtor had to pay a much higher value as a result of his unsuccessful appeal, the Supreme Court having no power to change the dollar amount awarded by the lower court. See also *Hus* v. *Kempf*, 12 Fed.Cas.No. 6,944 (S.D. N.Y., 1879). In *Winslow* v. *Bloom*, 1 Hayw. (2 N.C.) 217 (1795), the parties had contracted in terms of Spanish milled dollars at a time when a North Carolina shilling was equivalent to one-twelfth of a dollar. Thereafter the North Carolina shilling appreciated to one-tenth of a dollar. The creditor was awarded one-sixth less than the shillings given by him. But in this case a "dual currency" situation existed. An express statement to the effect that the debtor must bear an appreciation of the stipulated (Jugoslavian) currency is found in a judgment of the Hungarian Supreme Court of 1934, *Z.A.I.P.* 1937, 693, no. 29. See also the German cases *infra*, n. 65.

42. *The Pound Sterling* (1931) 332.

> hundred acre holding, will now scarcely pay a week's rental of two furnished rooms in a suburban villa. Yet the case of most, if not all the other currencies is far worse . . ."

Well-devised clauses by which creditors have tried to protect themselves have proved conspicuously futile.[43] The downward trend is stronger than man's cunning. There is venerable testimony against the perpetuity of debts. The Old Testament ordained each seventh year to be a year of release of debts and it exhorts the wealthy to lend to the needy regardless of the approach of the year of release.[44] Primeval wisdom is shown in these precepts.

II. Adaptable Debts

While immutability of the nominal amount under fluctuating currency has been generally accepted on principle there are special situations in which a court must take into account the fluctuations. One may speak in such cases of "adaptable" debts.[45] Among them, damages are outstanding. The person who has negligently or wilfully destroyed personal property of another, has to disburse a sum sufficient to enable the owner to buy a thing equivalent to the one destroyed. If money has depreciated meanwhile, the thing will cost more than at the time when the damaging act occurred. And the same is true *mutatis mutandis* with respect to other types of damages (nonperformance of a contract, personal injury, etc.). As long as damages are not "liquidated" there is no immutable nominal amount. Only pecuniary obligations purporting the payment of a definite sum are the proper object of the immutability rule. Consequently monetary depreciation ought to be included in the recovery of

43. *Infra*, secs. 15 to 19.

44. Deuteronomy 15:1; 15:2; and 15:9 ("Beware that there be not a thought in your wicked heart, saying the seventh year, the year of release is at hand.").

45. In *Das Geld* (1925), the writer suggested for this type of debts the term *Wertschuld* ("value-debt") which was also employed by the *Reichsgericht*, Oct. 4, 1926, *R.G.Z.* 114, 342; July 5, 1928, Zeller, *Aufwertungsfälle beim Reichsgericht* VI, no. 1314; Nov. 28, 1930, *R.G.Z.* 130, 367. In English the term "value-debt" would appear obscure. The underlying notion was objected to by Hubrecht, *supra*, n. 1, at 242, for the obviously fallacious reason that "all debts are 'value debts'." Contra: Ascarelli, *Z.A.I. P.* 1928, 783 at 800. Mann, *supra*, n. 3, at 79, takes a similar view, as does the present writer. Ascarelli has now elaborated his views in his *Saggi Giuridici* (1949) ch. X ("I *debiti di valore*"). He generally agrees with the tenets of the present writer adding references primarily to Italian and Brazilian writings.

damages. The highest courts of Italy [46] and Austria [47] and, to some extent, of Belgium,[48] have rightly held that compensation for damages must comprise loss through monetary depreciation. By the same token, the *Reichsgericht* distinguished between revaluation of debts aiming at equitable distribution of monetary loss, and damages which require full compensation.[49] Only in cases where a law peremptorily prescribes a definite date as conclusive in the fixation of damages, are subsequent fluctuations precluded from consideration.[50]

46. Ital. Cass., Aug. 10, 1946 *Riv.Dir. Comm.* 1947 II 103.

47. Austrian Supreme Court, Assembled Senates, June 18, 1924, *Rechtsprechung* VI (1924) 73. However, in a case where a private tutor had sold his service on the basis of the bread price, the Supreme Court surprisingly allowed only the price as of the time the lessons were given, despite the later depreciation of the money. Judgment of May 23, 1923, Coulon, *Mitteilungen des Verbandes Oesterreichischer Banken und Bankiers* VI 250.

48. Belg. Cass., July 7, 1938, *Pasicrisie Belge* 1938 I 261, explaining that Art. 1895 of the Civil Code does not relate to damages; same court, Jan. 17, 1929, *Revue de Droit Maritime* XXIII (1931) 91 and Feb. 26, 1931, *ibid.* XXV (1932) 75. A law of April 29, 1935, *Bulletin Usuel des Lois* 1935, 504 (see Bull. I.I.I. XXXIII [1935] 91) provided, in connection with the devaluation of the franc, that with respect to damages, devaluation was to be considered only to the extent that the *purchasing power* of the franc in the pertinent field ("*dans le domaine envisagé*") had changed up to the day of devaluation. Cf. *Piret, supra*, n. 1, at 200, and *Répertoire Pratique de Droit Belge* (1940), No. 1924 et seq., listing numerous decisions of lower courts. The above case of 1938 gives the decree a restrictive interpretation with regard to workmen's compensation.

Purchasing power was adopted as the measure of damages also by the Court St. Dié (France), Nov. 5, 1941, Sirey, *Chronique Rimensuelle* 1942, 96.

49. March 12, 1921, *R.G.Z.* 101, 418 [dealing with loss of stored goods]; June 13, 1921, *R.G.Z.* 102, 383 [injury wrongfully done to a horse]. See also the decisions of the *Reichsgericht*, May 23, 1923, *J.W.* 1924, 1868; Oct. 11, 1924, *ibid.*, 1925, 230; Sept. 18, 1926, *ibid.*, 1927, 1148; Nov. 30, 1926, *ibid.*, 1927, 981.

50. There is no merit in the view that such a prescription should be confined, through a splitting process, merely to the valuation of the *goods*, whereas consideration of fluctuations of *currency* until the date of liquidation, would be allowed. The question has been much discussed with an eye to a Belgian law which, in the case of the expropriation of land, made the value as of the day of the expropriation decree conclusive for the indemnification. Belg. Cass., Feb. 14, 1929, *J.D.Int.* 1931, 1195, set forth the above theory with the important qualification, however, that in the case of a later *devaluation* the owner should be compensated for the decrease in value as recognized by the devaluation law. Other supervening circumstances affecting the value of the land were held irrelevant. Belg. Cass., May 3, 1934, *Pasi-*

However, the "adaptability" rule is by no means well settled. American courts generally make allowance for changes of monetary value only in the determination of damages for personal injuries.[51] In a case involving damages to personal property a different attitude was taken by the Supreme Court in *Nortz* v. *United States*.[52] When the holder of gold certificates claimed damages from the federal government, incurred through the confiscation of the certificates on January 17, 1934, the Court dismissed the claim on the ground that on that day the statutory equation of one dollar to 25.8 grains of standard gold was still in force; as devaluation to 15-5/21 grains was not decreed until January 31, 1934. *Depreciation* of the dollar, however, had reached approximately the same level on January 17, raising the world market price of an ounce of fine gold to about $35, and accordingly raising the value of the gold dollar coins in terms of dollars about sixty per cent. Whether the holder of the certificate could avail himself of the world-market rate was a troublesome question; but admitting that he could, one can hardly deny that he suffered a loss of sixty cents of the face amount on every

crisie Belge 1934 I 268. More on the question in Piret, *supra*, n. 1, at 127ff., 214ff., and Mann, *supra*, n. 3, at 82.

51. *Butman* v. *State*, 188 Misc. 153, 67 N.Y.S.2d 271 (1947); *O'Brien* v. *Chicago & N. W. Ry. Co.*, 329 Ill. App. 382, 68 N.E.2d 638 (1946); *Butler* v. *Allen*, 73 Cal.App.2d 866, 167 P.2d 488 (1946); *Petty* v. *Kansas City Public Service Co.*, 354 Mo. 827, 191 S.W.2d 653 (1945); *Calihan* v. *Yellow Cab Co.*, 125 Cal.App. 649, 13 P.2d 931 (1932), and numerous other cases discussed in 3 A.L.R. 910 (1921); 18 A.L.R. 564 (1922); 60 A.L.R. 1395 (1929), and in the informative Note, "Fluctuating dollars and tort damage verdicts," 48 Col.L.Rev. 264 (1948). But cf. *Palmer* v. *Security Trust Co.*, 242 Mich. 163, 218 N.W. 677 (1928), setting aside a verdict which had awarded to a wage-earner seriously injured by a bus, $74,000 damages instead of $37,000 on the theory that the dollar had lost half its purchasing power. The court applied instead the "dollar-for-dollar" rule, advancing the obscure reason that the halving process should have been extended to the "wage-earned dollar" as well as to the "compensating dollar." However, the verdict was wrong inasmuch as the jury had assumed that the wage-earner without the accident would have earned the double amount and that the then existing and actually temporary loss in purchasing power would persist. In *Behrendt* v. *Time-Mirror Co.*, 30 Cal.App.2d 77, 85 P.2d 949 (1938), the diminished purchasing power of the dollar was held relevant in an action for libel.

Appellate courts, in the determination of damages, ordinarily look at the day of review. *Eichten* v. *Central Minnesota Co-operative Power Ass'n*, 224 Minn. 180, 28 N.W.2d 862 (1947), and other cases cited in the *Col.L.Rev.*, Note, *supra*, at 267, n. 18.

52. 294 U.S. 317, 55 S.Ct. 428, 79 L.Ed. 907 (1935)—one of the Gold Clause Cases. The same view had been set forth in 37 Op.Att.Gen. 403 (1934).

dollar of the certificates. Still, the court evidently felt that the nominalistic rule should take precedence over the rule of damages, though the particular argument chosen by the court would suggest that the adjudication might have been different, had the gold been confiscated after devaluation.[53] The nominalistic position in the matter of damages was also taken by courts during the greenback period.[54] The English view was made plain by Scrutton, L. J., when in a case turning on damages he stated: "A pound in England is a pound whatever the international value." [55] While this statement does not refer to domestic depreciation, there is little doubt that English courts will not be inclined to consider a depreciation of the pound in the assessment of damages. In France, too, the trend is definitely toward denying compensation for the depreciation of the franc.[56] Remarkably al-

53. This was, in fact, the theory of the Belgian Court of Cassation, *supra*, n. 50. However, Nortz would hardly have received a higher compensation had the gold been confiscated after January 30, 1934. He then had no access to the free gold market.

54. See cases collected in Dawson and Cooper, "Northern Inflation Cases," 33 Mich.L.Rev. 852 at 882 (1935). Even a depositor of gold coin, claiming damages from his depositary, was granted damages under that theory for only the nominal dollar amount, *Warner* v. *Sauk County Bank*, 20 Wis. 492 (1866). Other significant cases are *Frothingham* v. *Morse*, 45 N.H. 545 (1864) and *Riddlesbarger* v. *McDaniel*, 38 Mo. 138 (1866). *Simpkins* v. *Low*, 54 N.Y. 179 (1873) awarding damages in terms of gold bore upon a particular situation. The court took cognizance of the situation in California where greenbacks actually did not circulate, *infra*, sec. 42 I, a fact enhancing the value of California securities. The view that damages should include monetary depreciation was early taken in a well-reasoned annotation to *Winslow* v. *Bloom*, 1 Hayw. (2 N.C.) 217 1795).

55. *The Baarn*, [1933] P. 251, 265 (C. A., 1933). If the nominalist point of view is taken in the assessment of damages, it must prevail all the more in the case of ordinary debts, *supra*, n. 3.

56. Exact documentation is difficult because the assessment of damages is left to the trial courts which in this respect decide *souverainément*. Cf. Hubrecht, *supra*, n. 1, at 165, giving references.

The French point of view is characteristically reflected in the *baux à cheptel*, rural leases under which cattle are frequently given to the lessee under the agreement that at the expiration of the contract the lessee shall restore to the lessor cattle of the same value as estimated in the contract, any deficiency to be paid in cash (*baux à cheptel*, in German "iron-cattle" contracts, because an invariable stock of cattle has to be restored). When through the inflation the nominal prices for cattle soared, the question arose whether the value envisaged by the contract was the nominal amount of the estimate, or the value of such cattle as were worth that amount at the time of the estimate. The French *Cour de Cassation* held for the lessee, extending the nominalistic principle to the prefixed valuation and reject-

so, the *Reichsgericht,* ardent champion of general revaluation of debts, after the restoration of the German currency in 1924 refused to indemnify the owner of expropriated land for loss in purchasing power of the new *reichsmark.*[57] To be sure legal theories do not tell the whole story. One must realize that in the evaluation of goods and services it is extremely difficult, and will often not even be attempted, to separate the monetary (depreciation) factor from other influences in the formation of the market price.[58] Practically, therefore, in many cases, and especially where goods are damaged or lost, the claim may receive full compensation in the lower courts, despite adverse theories of higher courts.

Damages for delayed payment, as was seen,[59] are in the common law countries and elsewhere limited to interest, so that the problem of "adaptability" cannot arise there. It has, however, arisen in Germany and Austria where after World War I the courts labored for a long time under the terrors of growing in-

ing the theory of *imprévision* (*infra*, p. 190) in its judgment of June 6, 1921, *D.P.* 1921 I 73 and other cases cited in Hubrecht, at 117; see Planiol, *Traité Élémentaire du Droit Civil* II (11th ed., 1935), no. 1820 bis. *Contra*: Ital. Cass., Oct. 6, 1925; Sept. 26, 1925 and Dec. 17, 1925, *Corte di Cassazione*, 1926, 38, 40, 1115: May 12, 1927, *ibid.*, 1927, 1272. The *Reichsgericht* first decided in favor of the lessee (judgment of Feb. 13, 1920, *Seufferts Archiv* LXXV 267); however, on June 27, 1922, *R.G.Z.* 104, 394, the Court decided in favor of the lessor, following the trend towards revaluation. The latter case as well as the Italian cases led to an arbitrary handling of valuation and payments involved. In France the law was changed in favor of the lessor by Acts of June 9 and Oct. 5, 1941. Duvergier, *Recueil des Lois* 1941, 402 and 724. See also Baudin, *La Monnaie et la Formation des Prix* (2d ed., 1947) 350.

57. *Reichsgericht*, Nov. 28, 1930, *R. G.Z.* 130, 367, representing revaluation as an abandonment of the rule "paper-mark for gold-mark" rather than of the rule "mark for mark." This theory of the court is not convincing. It cannot explain the fact that the court favored "valorism" in respect to debts, but disfavored it with regard to damages. The reverse would have been more logical. Most of the "Senates" (Divisions) of the court had previously declined to grant "revaluation" to *reichsmark* debts when the new *reichsmark (infra*, p. 201) depreciated. However, this depreciation was relatively slight and purely domestic; in the market of foreign exchanges the statutory gold ratio of the *reichsmark* was being upheld. Domestic fluctuations of purchasing power could then well be considered as temporary.

58. Following Helfferich, *Das Geld* (2d ed., 1923), 563, the *Reichsgericht* took the position that it is generally impossible to separate the two factors. Judgments of March 31, 1925, *R.G.Z.* 110, 373 and Nov. 28, 1930, *ibid.*, 130, 373. This formula goes too far. See the Belgian cases *supra*, n. 50.

59. P. 159.

flation. At first the courts would grant depreciation damages to the money-creditor only on proof that had payment been punctual he would have protected the money against such depreciation, either by converting it into a stable foreign currency or in some other manner.[60] Still, in the Germany of 1923, when the mark dwindled to a thousandth, and gradually to a ten-thousandth, a hundred-thousandth, a millionth, and finally a trillionth of its value, the courts allowed reasonable damages on the basis that a loss was to be presumed ("abstract" damages).[61] Foreign creditors were particularly favored by the theory of the German courts.[62]

Damages are by far the most important instance of "adaptable" debts. Claims for recoupment of unjust enrichment evi-

60. *Reichsgericht*, April 8, 1921, *R.G.Z.* 102, 60; Sept. 24, 1921, *J.W.* 1922, 159; Austrian Supreme Court (Assembled Senates) March 8, 1923, *Rechtsprechung* V (1923) 220, and, not quite so strict, June 5, 1925, *Die Rechtsprechung* 1925, 118. As to Hungary, whose commercial and contract law were similar to the Austrian, see judgments of the Hungarian Supreme Court cited without date in *Auslandsrecht* III (1922) 311 and IV (1923) 254.

61. *Reichsgericht*, Jan. 29, 1924, *Warneyers Rechtsprechung des Reichsgerichts auf dem Gebiete des Zivilrechts* 1923/24 104, and many decisions of the appellate courts such as Berlin, June 13, 1923, *J.W.* 1923, 940; June 5, 1923, *ibid.*, 1923, 940; May 3, 1923, *ibid.*, 943; Breslau, July 12, 1923, *ibid.*, 946.

However, when the debtor tenders the money due and the creditor refuses to receive it, the risk of depreciation should shift to the creditor. See German Civil Code 320, par. 2, and Austrian Supreme Court, Dec. 3, 1936, *Entscheidungen*, 1936, no. 202 [in this case only a part of the dollars owed had been tendered, but the Court was probably impressed by the existing difficulties in procuring foreign exchange]. This reasonable limitation of the damage rule, observed as early as the American scaling laws of the eighteenth century (Hargreaves, *Restoring Currency Standards* [1926] 12) was not taken into account in *The Baarn* [1933] P. 251 (C.A., 1933), where the debtors had, with the Chilean court's consent, tendered to their Chilean creditors and deposited the money on their behalf with a Chilean bank. Judicial discussion turned only on the question whether the action taken by the debtors amounted to a payment. See also, *Pong* v. *Lindsay*, 1 Dyer 82b, 73 Eng.Rep. 178, 180 (1553) [debasement after maturity].

62. Foreign mark creditors were generally awarded depreciation damages on the theory that a foreign creditor would ordinarily have converted the marks into his domestic money. *Reichsgericht*, judgment of Feb. 20, 1920, *R.G.Z.* 98, 160, adopting this writer's view; Nov. 18, 1924, *ibid.*, 109, 281; March 16, 1920, *J.W.* 1920, 704; May 24, 1921, *ibid.*, 1921, 1311; similarly, Supreme Court of Czechoslovakia, Feb. 27, 1937, *Prager Archiv* 1938, 242 (depreciation of Czecho-crowns); *contra:* Austrian Supreme Court, Sept. 16, 1924, *Rechtsprechung* VI (1924) 214 at 216. The presumption in favor of the foreign creditor also appears in Swiss Federal Tribunal, April 10, 1922, *Die Praxis des Bundesgerichts* XI 209.

dently belong to the same category.[63] This characterization seems warranted also with regard to maintenance (alimony) and kindred claims for the supply of a definite quantity of purchasing power.[64] Where such claims are liquidated the case may still be open to judicial reformation where a serious change in purchasing power has unreasonably lowered or raised the guaranteed standard of living; to this extent a tacit *clausula rebus sic stantibus* should be read into the liquidated agreement.[65]

63. *Reichsgericht*, Oct. 4, 1926, *R.G.Z.* 114, 342 at 344; Oct. 11, 1927, *R.G.Z.* 118, 185 at 188. The same rule was employed by the German-Belgian Mixed Arbitral Tribunal, June 11, 1923, *Recueil des Décisions des Tribunaux Arbitraux Mixtes* III 291, and by the Roumanian-German Mixed Arbitral Tribunal, March 31, 1927, *ibid.*, VII 738. *Contra:* Austrian Supreme Court, March 10, 1926, *Die Rechtsprechung* 1926, 74.

Mention may be made in this connection of the rescission of sales of immovables, allowed by the French and Belgian Civil Codes 1674 in case the vendor has obtained less than five-twelfths of the value of the immovable (*lésion* of the vendor). The application of this old French rule gave the legislature much concern with regard to contracts made during the assignats period. Marcuse, "Unbalanced transactions at civil and common law" 43 I.C.L.Rev. 1066, 1072 (1943); Mater, *Traité Juridique de la Monnaie et du Change* (1925) 170. For recent applications see Piret, *supra*, n. 1, at 27.

64. Characteristically they have been exempted from the effects of the Conversion (devaluation) Law of 1948 for the German occupation zone, Art. XVIII(1) (1), 13 Fed.Reg. 4965.

65. *Reichsgericht*, May 26, 1921, *J.W.* 1921, 1080; Jan. 26, 1923, *R.G.Z.* 106, 233; cf. also Dec. 5, 1939, *J.W.* 1939, 345. The same principle was employed by the Austrian Supreme Court, April 20, 1926, *Die Rechtsprechung*, 1926, 135, the Supreme Court of Czechoslovakia, see Wahle, *supra*, n. 7, at 169, n. 3, and the Trib. civ. Brussels, Nov. 2, 1929, cited by Piret, *supra*, n. 1, at 43. Adaptability of family maintenance claims, including liquidated ones, has been recognized also by Italian writers. Ascarelli, "Währungsrechtliche Fragen in der Italienischen Rechtsprechung," *Z.A.I.P.* 1928, 793, 801; *id.*, *Saggi Giuridici* (1949) 378; Scaduto, *Debiti Pecuniari e il Deprezzamento Monetario* (1924) 192. An "inflation clause" has been devised for a contract by Lindey, *Separation Agreements* (1937) 180. A court may modify its own maintenance decrees because of altered circumstances. Cf. Schouler, *Divorce Manual* (1944) sec. 271(b). This rule extends almost certainly also to changes in purchasing power, though there seem to be no cases on record. Comparative: *Rechtsvergleichendes Handwörterbuch* (ed. by Schlegelberger) VII (1939) 20, "Unterhaltspflicht."

Life insurance debts and annuities, to be paid by insurance companies, are business transactions which must be calculated on strict mathematical principles because of the necessity of maintaining insurance reserves. They are not adaptable like familial maintenance rights. Contra: Austrian Supreme Court,

Bequests in depreciating money are as a rule not adaptable.[66] However, where the result would be contrary to the obvious intent of the testator attempts have been made by courts to honor that intent by protecting the legatee from losing the benefit of the bequest. The Prussian Code of 1794 provided in general terms that the value of the money bequeathed should be converted into silver at the current date of the day when the will was made.[67] Under present conditions that day may well be used in determining a proportionate share of the legatee in the estate.[68] In the case of a bequest of ten thousand francs made in 1896 by an American in France, an American court held this to mean gold francs.[69] The solution was acceptable under the circumstances. One should bear in mind, however, that juridically these legacy cases have nothing to do with the "adaptability" situation discussed above. They rest entirely on the rules of interpretation of wills.[70]

April 20, 1926, *supra*. Under German revaluation law a partial reestablishment of life insurance claims was provided by a decree of August 28, 1924, *R.G.Bl.* 1924 I 694. Annuities being part of a purchase price of real estate will not be lowered because of an increase in the purchasing power of money. *Reichsgericht*, April 11, 1938, *J.W.* 1938, 2135.

66. A German resident of Switzerland who died in 1918 had bequeathed 50,000 marks in 1917 to the University of Heidelberg. When the mark had depreciated to one-thousandth, the Swiss Federal Tribunal, April 26, 1923, *Amtliche Sammlung* 49 II 12, refused to adapt the legacy to the new situation. Also in *In re Illfelder's Estate*, 136 Misc. 430, 240 N.Y.S. 413 (1930), *aff'd*, 232 App.Div. 740, 249 N.Y.S. 903 (1931), the mark-for-mark rule was applied to an American mark legacy paid over to the legatee in 1924.

67. *Allgemeines Landrecht für die Preussischen Staaten* [drafted during the reign of Frederick the Great], I, Chap. 12, §§ 450, 451.

68. A similar view was taken by App. Colmar, Nov. 2, 1926, *Revue Juridique d'Alsace et de Lorraine* 1927, 144, in converting a mark bequest into francs, with the death day, however, controlling.

69. *In re Willing's Estate*, 288 Pa. 337, 135 A. 751 (1927). A faulty adjudication occurred in *Matter of Martha Lendle*, 250 N.Y. 502, 166 N.E. 182 (1929). The New York Court of Appeals allowed the *mark*-legatee the nominal amount in *reichsmarks* although the will was made in 1920 when the mark had already depreciated considerably. The Court erroneously took the new German monetary unit, called by the court "mark" instead of "reichsmark", for a new "reestablished" *mark* unaware that that *mark* debts had been recast into *reichsmark* debts at a ratio of one trillion to one. *Infra*, sec. 13 IV. The mistake cost the estate $105,355, or at least a considerable part thereof.

70. See *Saunders* v. *Drake*, 2 Atk. 465, 26 Eng.Rep. 681 (1742), interpreting a "pound" bequest to mean Jamaican pounds which were be

Depreciation of the domestic monetary unit is always a matter of judicial notice.[71]

III. Executory Contracts

Hitherto we have been concerned only with the repercussion of fluctuating currencies on pecuniary obligations, severing them, in the case of a contract, from other contractual obligations. However, in bilateral contracts, as long as they are executory, a monetary problem arises with regard to obligations for the future delivery of goods or services. Is the obligor liable to performance according to the terms of the contract if, after its conclusion, the currency stipulated for depreciates considerably, at the same time enhancing wages, prices of raw material and other elements of performance? The problem is particularly significant in connection with construction contracts and leases obligating the lessor to supply the tenant with gas, electricity or heat under the stipulated terms. According to the nominalistic theory, there is a duty to perform the obligation in return for currency of the decreased purchasing power. However, the situation differs somewhat from the case of a simple debt. Imposing a loss, through depreciation, upon a money creditor is one thing; compelling the obligor to deliver his goods or services for a consideration which has become only a fraction of what it was before is another thing. Courts, apart from any revaluation doctrine, are apt to treat these two problems differently; namely, to grant relief in the latter situation even though they refuse it in the first. For instance, in 1854, a lessee of premises in Washington, D. C., was given a ten-year option to purchase the premises at a fixed amount. In April, 1864, when the dollar had depreciated more than forty per cent, the lessee exercised the option. The United States Supreme Court in *Willard* v. *Tayloe*,[72] refused to grant him specific performance against the lessor on the ground that it would be "inequitable to compel a transfer of the property for notes, worth when tendered in the

low sterling standard. Another case in point is *Oppenheimer* v. *The Public Trustee*, reported by Mann, *supra*, n. 3, at 320 (A.C., 1927), regarding a bequest in marks. In *re Schnapper; Westminster Bank, Ltd.* v. *Schnapper*, [1936] 1 All.E.R. 322 (Ch.), the Court for obscure reasons, invoked the German revaluation law in the judicial determination of a mark bequest. See Schoch, "Rassegna di Giurisprudenza Inglese", *Giurisprudenza Comparata di Diritto Internazionale Privato*, ed. by Istituto Italiano di Studi Legislativi V (1939) 303; Mann, *supra*, n. 3, at 205.

71. *Supra*, p. 31, n. 46.

72. 8 Wall. (75 U.S.) 557, 19 L.Ed. 501 (1869), which is thoroughly analyzed by Dawson and Cooper, *supra*, n. 54, at 863.

market only a little more than one-half of the stipulated price". The Court held that the plaintiff should have rendered gold or silver coin. Although this view suggests the impending invalidation of the greenbacks, in *Hepburn* v. *Griswold*,[73] the line of argument and the unanimity of the Court in *Willard* v. *Tayloe* place it beyond doubt that the theory of *Willard* v. *Tayloe* is independent of the later case. The court's reasoning is not very forceful [74] except for its broad development of an equitable specific performance doctrine, but it offers an interesting contribution to the legal theory of executory contracts during an inflationary period.

Another instance may be taken from Austrian law. In the case of an executory sale of goods, the Austrian Supreme Court gave the seller relief against the purchaser who, without technical default, had not forthwith tendered the purchase price. The court held on equitable grounds that the purchaser must bear the risk of subsequent depreciation.[75]

However, the doctrine most often invoked in continental countries is the frequently resurrected and variously renamed rule of *"clausula rebus sic stantibus"*, which had grown up in the Middle Ages and disappeared in the seventeenth and eighteenth centuries.[76] According to this ancient rule, a tacit clause was generally read into contracts to the effect that the binding effect of the contract depended on the continuance of the basic conditions existing at the time of contracting. The doctrine was used by the German courts in the preliminary phase of the revaluation movement as a ground for recission of executory contracts.[77] It was cautiously employed in Switzerland where it is expressly recognized by statute, in connection with construction con-

73. 8 Wall. (75 U.S.) 603, 19 L.Ed. 513 (1869). *Infra*, sec. 42 II.

74. *Humphrey* v. *Clement*, 44 Ill. 299 (1867), and other cases cited by Dawson and Cooper 866, n. 189, held to the contrary, and *Willard* v. *Tayloe* was disregarded in *Longworth* v. *Mitchell*, 26 Ohio St. 334 (1875).

75. Judgment of Dec. 5, 1925, *Die Rechtsprechung*, 1926, 35.

76. Hubrecht, *supra*, n. 1, at 219; Ripert, *La Règle Morale dans les Obligations Civiles* (3rd ed., 1935), n. 82; *Krückmann*, "Clausula rebus sic stantibus, Kriegsklausel, Streikklausel", *Archiv für Civilistische Praxis* CXVI (1918), 157; Osti, *"La cosidetta clausula 'Rebus Sic Stantibus' nel suo sviluppo storico"*, *Rivista di Diritto Civile* IV (1912) 1.

77. The various phases of the German doctrine can be understood only in connection with the facts of the German inflation, *infra*, p. 199. The German doctrine was to some extent followed by Polish courts. See Przybylowski, *Zeitschrift für Ostrecht* 1929, 169.

tracts.[78] In France it was applied in administrative law,[79] where it was named the theory of *imprévision* in order to emphasize the "unforeseeability" of the events set forth as a defense. However, suggestions by French writers for an extension of the *imprévision* theory to private contracts[80] were rejected by the French[81] and, after some hesitation, by the Italian courts.[82] Other jurisdictions followed a similar policy.[83] The Italian Civil

78. The Swiss Code of Obligations, art. 373, in its first paragraph provides that the contractor in case his expenses or labor were greater than foreseen is not entitled to an increase in the compensation contracted for, but art. 373, par. 2, then goes on to prescribe: "If completion is prevented or is made too difficult through extraordinary and unforeseeable events or through events which were excluded under the presuppositions made by both parties, the court, in its discretion, may award an augmentation of the price or rescission of the contract." After World War I the rule was extended somewhat to other types of contracts in case enforcement of the contract would result in the financial ruin of the obligor. Swiss Federal Tribunal, July 1, 1924, *Amtliche Sammlung* 50 II 256 at 264; April 8, 1930, *ibid.*, 56 II 189 at 194. See Siegwart, "Der Einfluss veränderter Verhältnisse auf laufende Verträge" in *Festgabe der Juristischen Facultät der Universität Freiburg zur 59. Jahresversammlung des Schweizerischen Juristenvereins* (1924) 77. The "ruin" rule was taken from German law, *infra*, p. 203.

79. In a controversy involving the *City of Bordeaux Gas Company*, the *Conseil d'Etat*, highest administrative court of France, applied the theory of *imprévision*, for the first time to major monetary changes, awarding an increase in rates to the company on account of the inflationary rise in wages and prices. Judgment of March 30, 1916, *D.P.* 1916 III 25. Other cases are cited in Planiol, *Traité Pratique du Droit Civil* VI (1930), 548, n. 1. In Italy revision of prices in contracts for public work was set by decree of July 21, 1927, no. 1316, *Raccolta Ufficiale* 1927 III 3386, transformed into statute by law of June 14, 1928, no. 1575, *Raccolta Ufficiale* 1928 III 2594.

80. Particularly by Ripert, *op. cit. supra*, n. 67.

81. The leading case is App. Paris, Dec. 21, 1916, *D.P.* 1917 II 33. An annotation by Professor Capitant offers a full discussion of the development of the French law on the problem before us.

82. Ital. Cass., April 7, 1923, *Giurisprudenza Italiana* 1923 I 458; Jan. 26, 1924, *ibid.* 1924 I 150; April 26, 1926, *ibid.* 1926 I 1128; April 30, 1926, *ibid.* 1926 I 1130. The Italian term for the theory rejected is *presupposizione*, leaning probably on the German *Geschäftsgrundlage*, *infra*, p. 203, n. 42.

83. In Court Arnheim, Feb. 22, 1937, *Nederlandsche Jurisprudentie* 1937, 1399, the vendor's rescission of an executory contract of sale, on the ground of the devaluation of the guilder after the making of the contract, was disallowed. The court even held inapplicable a contractual "crisis clause" according to which any "burdens" subsequently laid upon the seller's turnover would be at the charge of the buyer.

A case decided in 1921 by the Supreme Court of South Australia, likewise resting on an interpretation of contractual clauses, is sim-

Code of 1942, § 1467, tries to rebuild the old *clausula*. It proclaims, as a general rule of the law of contracts, the unilateral rescindability of contracts involving continuous or periodic execution, if the performance becomes "excessively onerous" as a result of "extraordinary and unforeseeable events." This might very well include inflationary developments.

Common law possesses a doctrine of "implied condition" which would make it possible to grant an obligor relief in the case of unforeseeable events that make performance reasonably impossible,[84] but so far courts have refrained from extending this theory to hardships originating in monetary depreciation.[85]

As a matter of fact, it is the function of the legislature rather than of the judiciary to prepare emergency regulations for the adjustment of pending private contracts to changed monetary conditions. Such emergency legislation may confer upon courts or other judicial agencies, power to rescind unduly burdensome contracts and to grant equitable relief to the party adversely affected by the rescission.[86] Sometimes legislative authorization

ilar in effect. The contract, couched in terms of English currency was cancelled by the seller after the fall of the English pound during the war; he having the right to cancel "In the event of war affecting this contract". The Court held the cancellation bad because the contract imposed upon the buyer a 2½ per cent extra charge "to cover exchange and conversion", thereby settling the effects of rate of exchange fluctuations. *Rosenfeld and Co. (Pty) Ltd.* v. *Cowell Bros. and Co. Ltd.*, [1921] South Australia State Rep. 13. See also App. Douai, *infra*, sec. 267, n. 28.

84. The leading case is *Taylor* v. *Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (1863).

85. See Williston, *Contracts* (rev. ed.), sec. 1932, n. 2, and regarding English law, Mann, *supra*, n. 3, at 87.

In the United States rates of public utilities are not regulated, on a contract theory, as they are in France, but by administrative authorities under judicial supervision. Rules related to monetary depreciation have not evolved in this field. Cf. Goddard, "The interest of public utility ratepayers in depreciation," 48 Harv.L.Rev. 721 (1935); Herrman, "Public utility valuation and the depreciated dollar," 5 John Marshall L.J. 17 (1935). Under State railway regulation it was held that a two-cent fare awarded by State law referred, in the case of dollar depreciation, to the depreciated money. *Lewis* v. *New York Cent. R. Co.*, 49 Barb. (N.Y.) 330 (1867).

86. *E. g.*, the French *Loi Faillot* of Jan. 21, 1918, *D.P.* 1918 IV 261, as amended by law of May 9, 1920, *ibid.*, 1920 IV 85, regarding executory pre-war contracts. On the highly arbitrary German legislation of 1918-1921, see Nussbaum, *Das Deutsche Wirtschaftsrecht* (2d ed., 1922) 35. Italian emergency legislation is discussed by Scaduto, *Debiti Pecuniari e il Deprezzamento Monetario* (1924) 138. Similar Belgian legislation was enacted on Oct. 11, 1919, *Recueil des Lois*, 1919, 1678.

will include power to reform contracts and, particularly, to increase rents or other dues with an eye to the depreciation of the currency.[87] Enactments of that type seem to be absent in the United States.

Section 13

INFLATION

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I. Concept and Types of Inflation

Inflation may approximately be described as a general abundance of available cash, enhancing prices heavily and continually.[1] The term, though of Latin root, is of English origin,[2] and received its present monetary meaning in American usage after the Civil War. Since then it has spread over the world. The phenomenon of inflation is purely economic. Probably because of the difficulty, if not impossibility, of arriving at a satisfactory definition, the familiar term has not passed into statutory language, nor has it given rise to problems of interpretation of contracts or wills. However, some information on inflation is necessary for a proper understanding of certain legal concepts, such as revaluation (sec. 14). Moreover, there are some typical legal, or, more specifically, legislative problems which relate to the inflationary process as a whole, in contrast, for instance, to the issues of adaptability of debts, which are issues of their own (sec. 12, *supra*).

87. This way was chosen particularly in regard to leases. Regarding the pertinent French legislation, see Planiol, *op cit.*, II, no. 1706 *bis*-1706 *quar*. On German law, Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* II (9th ed., 1928), 347, 612. However, under these and similar emergency legislations the situation is different because of the legislative extension of existing lease contracts.

1. This definition on the whole, is in accord with prevailing opinion. See, *e. g.*, Murad, "Inflation in current economic literature" in H. Parker Willis and John M. Chapman, *The Economics of Inflation* (1935) 221; *Encyclopedia of the Social Sciences*, "Inflation."

2. More on the word history in the writer's article, "The meaning of inflation," 48 Pol.Sci.Q., 86 (1943). It is significant that the vernacular Italian transformation of the Latin *inflatio* is *enfiagione* (swelling), while *inflazione* is directly borrowed, as a monetary term, from American English.

Inflations are a very old and very common phenomenon.[3] Inflation-like processes were brought about during the older era of metallic currencies through "debasement" and "raising" of coins as described earlier in this volume,[4] but the then inflationary effect though heavily felt if recurring again and again, cannot be compared with the disaster wrought through excessive issue of paper money. China had a paper money inflation at the beginning of the twelfth century.[5] Within the orbit of Christian civilization the earliest paper money inflation began in Massachusetts after Queen Anne's War (1702–1713),[6] which was soon far surpassed by John Law's notorious experiments with French bank notes. While the nineteenth century gave rise to a respectable number of inflations,[7] the twentieth century undoubtedly represents their "flourishing" period.

From an economic and legislative point of view one can perhaps distinguish between the chronic (lingering) and the pernicious (precipitate) type of inflation. The Portuguese Bank Note case,[8] for instance, indicates that inflation of the escudo had

3. Despite the unusual interest of the subject, we do not possess as yet any major study, economic or legal, covering the problem of inflation as such, though mention may be made of Watkins, "The economic aspect of inflation," 33 Mich.L.Rev. 153 (1934). The more important publications in the field are more or less confined to local developments, e. g., Bresciani-Turroni, *The Economics of Inflation*, (tr. Sayers, 1937) (dealing with the great German inflation); F. D. Graham, *Exchange, Prices and Production in Hyper-Inflation: Germany 1920–1923* (1930); S. E. Seymour, *The Assignats* (1930); A. D. White, *Paper Money Inflation in France* (1876); W. L. Mitchell, *Gold, Wages and Prices under the Greenback Standard* (1908); and others. More general in outlook is C. A. Schaeffer, *Klassische Valuta-Stabilisierungen* (1922), a comparative study not limited to stabilization; cf. also *Bank-Archiv* of Oct. 25, 1920, *Beilage*, "Inflationen." The problem of inflation is little if at all considered in general textbooks and treatises on money.

4. Supra, p. 38. As far as debasement of coins goes, enough instances can be found as early as antiquity. See, e. g., Segré, "Some traits of monetary inflations in Antiquity and the Middle Ages," *Seminar* I (1943) 20.

5. Carter, *The Invention of Printing in China and Its Spread Westward* (1925) 73. Edkins, *Chinese Currency* (1901) 19 refers to an inflation of the fourteenth century.

6. *Infra*, sec. 40 IV.

7. With the exception of Austria, the German states remained remarkably free of inflation. During the Napoleonic wars inflationary treasury notes *(Tresorscheine)* were emitted, but later redeemed at par, *supra*, p. 37, n. 23. The whole event was soon forgotten. Lack of experience accounts in part for unenlightened German views on this matter, which also appear in court decisions, *infra*, p. 254.

8. *Supra*, p. 84.

started in 1891, and that the inflationary process was still going on in 1925, when the escudo had lost about 95% of its original value. Other instances of "chronic" inflations are found in Latin-American republics, as in Argentina from 1885–1899.[9] Pernicious inflations are familiar enough from John Law and the French assignats. This country has experienced both types, chronic ones during Colonial times, during the greenback period, and since 1939; pernicious ones through the decay and collapse of the "Continentals" and the Confederate dollar. The ultimate outcome of pernicious inflation has been aptly depicted by the American Military Government of the German occupation zone in a recent study,[10] which while directly concerned with Germany after World War II, nevertheless possesses a general validity. In the last stages of what is called above "pernicious" inflation, the Military Government points out that money "ceases to be an instrument to work or to produce; it loses its most important quality of being respected as a value in itself for future use. Distrust of the currency leads to hoarding by the farmer, and disinclination to deliver his agricultural products for money; it leads to absenteeism on the part of the worker, and refusal to work without commodity supplement, usually food . . . it leads to disinclination on the part of the manufacturer to sell his goods for money unless he receives other tangible goods in return; in more extreme cases producers become reluctant to produce for the market at all, choosing time-wasting methods of production in order to postpone selling as long as possible."

War is the main cause of inflation, but definitely not the only one.

II. Reaction of the Law to Inflationary Conditions

The law will strongly and often violently react to inflationary developments as soon as their impact begins to be distinctly felt by the community. Modern man has become rather inflation-conscious, so that reaction will start pretty soon and may rapidly affect all ways of life. The result will be a formidable body of emergency law far beyond the proper monetary field. Only a few lines may be sketched here.

One of the oldest and most primitive weapons of anti-inflation legislation was mentioned before, namely, the vesting of legal-

9. *Infra*, p. 197.

10. Military Government of Germany, Trade and Commerce, *Monthly Report of the Military Governor, U. S. Zone, No. 77* (March 8, 1945 to Nov. 30, 1946) [mimeographed.]

tender quality upon the inflationary issues of paper money, and the enforcement of this measure by the threat of severe punishment. In our day paper money is legal tender anyhow, and criminal persecution for refusal to accept it is out of the picture. Another old piece from the anti-inflation arsenal is the common law opposition to "restraint of trade," especially to "forestalling the market." Such forestalling may consist in keeping victuals and other provisions off the market, or in enhancing their prices by other artificial means.[11] In France the Penal Code of 1804 Art. 419, makes punishable maneuvers purporting the artificial rise or fall in the price of goods; it thereby counteracts speculative or movements invariably connected with inflation. An interesting variety of this type of repressive legislation was produced in Germany during World War I and the following years when the lawgiver declared as punishable transactions involving the "excessive raising" of prices, and any raising of prices by way of "chain trade," that is, by interjection of unnecessary intermediaries in the movement of goods from producer to consumer.[12]

However, experience has shown that generalizing and punitive norms of the type discussed are not really effective. Measures of a much more detailed and refined nature must be taken if some success is to be attained. They will equally affect foreign and domestic commerce. In the former field, exchange restrictions bear directly upon the law of money. In the domestic situation the variety of possible measures is vast, ranging from such timid means as legislative and administrative restriction of credits, down to rationing of, and ceilings (maximum rates) for goods, rents and services. These are the measures considered as the paramount legal tools for repressing or delaying the course of inflation. Pertinent legislation differs widely according to local conditions. However, the same typical repercussions in the legal sphere will be the result of those anti-inflationary measures. Perhaps the most important among them is the disturbance of valuation—which always proceeds in terms of money—by the emergence of "black" markets.[13] Courts and other authorities in assessing damages or in making valuations on other grounds, will not contemplate black market prices; in fact, the parties themselves will be reluctant to invoke them or to put them in

11. Jones, "Historical development of the law of business competition," 35 Yale L.J. 905 (1926).

12. The writer's, *Das Neue Deutsche Wirtschaftsrecht* (2d ed., 1922) 26.

13. On this problem, little examined as yet, cf. Baudin, *La Monnaie et la Formation des Prix* (2d ed., 1947) 229, referring to the French law of March 15, 1942, and decree of June 30, 1945, defining the prerequisites of punishment for dealing in the black market.

evidence. Black market prices, staggered as they are by the risk of criminal persecution and by other impediments, do not express the real relationship of demand and supply, the basis of scientific valuation. On the other hand, lawful ceiling prices frequently do not express that relationship either insofar as people cannot get the necessary quantity or quality at ceiling prices. As a result valuation will become largely arbitrary or downright false. The usefulness of price indices which needs must rely upon official quotations, will also be greatly impaired. So far no legal theories have been evolved which would allow a departure from ceiling prices in valuation processes.

Another typical problem of monetary law arises where despite inflation the former gold ratio of the monetary unit, though actually abandoned, is still preserved in the statute books. There should be little doubt that statutory pronouncement is not sufficient to establish a "gold standard." [14] As the Gold Clause cases and other cases show, however, courts have construed the pronouncement to mean that they are bound to determine the value of the monetary unit as if the prescribed gold ratio were still in existence.[15] Hence the statutory proclamation, removed though it be from reality, has been allowed to preserve legal significance, and undoubtedly remains meaningful in administrative relations. As shown above, it obligates the government agencies responsible for the national currency, to do everything within their power to maintain or to restore the prescribed gold ratio.

The impact of soaring interest rates upon the application of usury law,[16] is another question in point.

III. Stabilization

The inflationary process, though it may drag through years and years, must ultimately come to rest. Stabilization may be attained by the restoration of the original gold (or silver) ratio as in the greenback situation and in England after World War I. The typical tool of such restoration is "deflation," namely, contraction of available media of payments. Improvement of general economic conditions may be of great help in attaining this result. The more frequent method is "devaluation" by which a new gold

14. German courts, confronted with the problem during the Great Inflation, skirted the crucial point. See *Reichsgericht*, Jan. 11, 1922, *R.G.Z.* 103, 384, 386; Supreme Court of Bavaria, Sept. 30, 1922, *J.W.* 1923, 126, 127; also *Reichsfinanzhof* (taxation court of last resort), Jan. 31, 1922, *Sammlung der Entscheidungen und Gutachten des Reichsfinanzhofs* VIII 100.

15. *Infra*, p. 288.

16. *Supra*, p. 165.

ratio is fixed on a lower level. In 1934 the dollar was devalued to the lowest degree of depreciation, but in other cases devaluation has been put through at a higher level than the lowest reached before. Thus devaluation may go hand in hand with deflation. Upward devaluation may also be the result, wholly or in part, of economic improvement. Argentina offers a famous example.[17] In 1885 the gold standard established by the Monetary Law of 1881 at the ratio of 1 peso = 1.6129 grams of gold was abandoned, whereupon, as mentioned, a long period of lingering (though sometimes critical) inflation set in. However, from 1893, owing to the economic progress of the country, the Argentinian paper peso began to rise steadily in the international money market. Prices in the domestic market dropped accordingly, to the disadvantage of Argentinian producers, while employees, for instance, profited from the situation. The time had come for stabilization, which was carried out primarily with the objective of checking the further *upward* movement of the peso. In 1899 the governmental Conversion Office (Caja de Conversión) was authorized by law to buy and sell gold for paper pesos at the fixed rate of one paper peso for 0.44 gold pesos (44 *centavos*), or —which amounts to the same—2.27 paper pesos for 1.6129 grams of gold.[18] The peso of 1881, now the "paper peso", remained the monetary unit, and the common medium of exchange. The gold peso, though coined to some extent, was not put into circulation. It was not really money, but a unit of account, widely used in Argentina's foreign trade and finance. Though the peso was not formally devalued the authorized new practice of the Conversion Office amounted to devaluation for all intents and purposes. Similar measures were carried out in other Latin-American republics.[19]

The third method of stabilization is the creation of a new monetary system. This will happen only where inflation has been "pernicious." The establishment of a new system requires the issuance of new money pieces or notes, though older circulating media may be integrated into the new system as "exogenous" elements. There are obvious advantages in placing the new unit on the same gold ratio which the old ratio had prior to the infla-

17. Masson-Forestier, *Les Caisses de Conversion et la Reforme Monétaire en Argentine et Brézil* (1913) [with the text of the laws]; Cuneo, *Banking and Currency in Argentina* (1932); Fetter, *Monetary Inflation in Chile* (1931); Schaefer, *supra*, n. 3, at 16.

18. The Caja de Conversion was closed in 1914, reopened in 1927, and closed again in 1929. Cuneo 22. Regarding the Argentine "gold clause" problem *infra*, p. 227.

19. Especially by Brazil. Masson-Forestier, *supra*, n. 17, at 170.

tion. This link with the past may be strengthened by relating the new name to the old by way of a prefix,[20] though such a procedure may give rise here and there to confusion.[21] Whatever the name, the creation of a new currency will ordinarily require deflation which might work considerable hardship.[22]

The most striking difference between the establishment of a new currency and devaluation relates to the treatment of debts. Devaluation, as was seen, leaves debts legally unaffected. The creditors have to bear the loss as a matter of course. Where a new currency is created the normal legislative procedure is to provide a recasting rule, namely, a rule recasting the debts created in terms of the former monetary unit into the new unit. Such recasting if financially aimed at partial or full reconstruction of the debts, is called revaluation. Recasting depends entirely upon the lawgiver. Recasting was deliberately omitted when the Soviets established the "gold" ruble currency in 1924, exchanging 50 milliards of the old ruble for one gold ruble.[23] Nothing was said then about obligations incurred in old rubles. The destruction of the old ruble debts by the antecedent pernicious inflation was not modified because it fitted into the Soviet policy.[24]

20. Probably the best known instance is the "reichsmark" of 1924, *infra*, p. 201. Austria, on the contrary, in 1924, replaced the "crown" by the "schilling" on the basis of 14,400 crowns for the schilling. Law of Dec. 20, 1924, *Bundesgesetzblatt* 1924, No. 461. See Van Walré de Bordes, *The Austrian Crown* (1927).

21. Such confusion appears in *Matter of Martha Lendle*, *supra*, p. 187, n. 69, and in a judgment of the District Court of Northern California, dated March 1, 1928, reported in *J.W.* 1928, 2884. A similar mistake occurred in *In re First Russian Ins. Co.*, 255 N.Y. 428, 175 N.E. 118 (1931), where on a pre-revolutionary life insurance policy new gold rubles were awarded instead of depreciated old rubles. See, however, *Dougherty* v. *Equitable Life Assur. Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934), *infra*, n. 24.

22. Discussion of the financial and political aspects of deflation is not within the scope of the present volume, but it may be mentioned that the first known riots for monetary reasons were the result of a *melioration* of money carried out in 1306 by Louis the Saint of France. Gonnard, *Histoire des Doctrines Monétaires* I (1935) 73.

23. The situation discussed *supra*, p. 145, was different (change of sovereignty).

24. Cf. Arnold, *Banks, Credit and Money in Soviet Russia* (1937) 175; Hubbard, *Soviet Money and Finance* (1936); and especially Katzenellenbaum, *Russian Currency and Banking* (tr. from Russian, 1925) 49. American courts have repeatedly recognized that the old ruble debts have entirely evaporated. Particularly in *Dougherty* v. *Equitable Life Assurance Society*, *supra*, n. 21, the ruble development was carefully investigated. In this case it is mentioned that the Soviet Government in issuing new ruble series, repeatedly invalidated former issues, although pro-

In recent times the recasting rules have become extremely elaborate, discriminating among the various debts according to the time of origin, to their economic nature, to the group to which the creditor belonged, and to other criteria.[25] This means that certain debts will be revalued and others not.

IV. Legal Aspects of the Great German Inflation, 1918–23

"The depreciation of the mark of 1914–1923," said the English economist, Professor Robbins,[26] "is one of the outstanding episodes in the history of the twentieth century. Not only by reason of its magnitude but also by reason of its effects, it looms large on our horizon. It was the most colossal thing of its kind in history; and next to the Great War itself, it must bear responsibility for many of the political and economic difficulties of our generation. It destroyed the wealth of the more solid elements in German society, and it left behind a moral and economic disequilibrium, apt breeding ground for the disasters which have followed." This was written in 1937. Later years have confirmed the correctness of Professor Robbins' diagnosis. The cynicism displayed by the Hitler régime and the readiness of the nation to submit to it were to no small degree the result of the inflation which had crushed many decent elements of the populace and

vision was made for exchange of the old for the new notes at a definite ratio. *E. g.*, in 1922, the issue of former ruble notes was discontinued, these notes being exchangeable within a certain period, at the rate of 10,000:1. The Court considered this to be the "adoption of an entirely new standard" (at 93). Still there had been earlier and was later [save for the *chervonetz* and the "ruble in gold" (at 94)] only one unit, the ruble, the natural depreciation of which was more or less reflected by the legal exchange ratio. The several denominations (*Duma-ruble, Kerenski-ruble, 1922 pattern*, etc.) simply referred to the various sets of ruble notes. Since the unit finally collapsed entirely, there was no claim left for the ruble creditor. Practically the New York court reached the same result by applying the legal exchange ratio to the consecutive ruble issues and holding that the debtor owed the last one. See also *Parker* v. *Hoppe*, 258 N.Y. 365, 370, 179 N.E. 770 (1932), where the evidence introduced in court had been less complete, and *Dougherty* v. *National City Bank*, 157 Misc. 849, at 868, 285 N.Y.S. 491 (1935), where it was stated that the *chernovetz* was a new and different unit. It was that, alongside of the old ruble, from 1922 to 1924, entailing a parallel ("bipaper") standard. In 1924 *chernovetz* became simply a name for ten "gold" rubles, the gold ruble being the new unit. The observation of the text also applies to the Soviet-inspired Hungarian inflation of 1945/46, *infra*, n. 33.

25. The "Conversion Law" of 1948, for the Western-German occupation zone, *supra*, p. 186, n. 64, is an instance.

26. Foreword to Bresciani-Turroni, *supra*, n. 3.

had in every way stimulated and rewarded immorality and ruthlessness.[27]

The enormity of the inflationary event itself is reflected by legal developments.[28] To make them understandable we must first briefly state the basic facts.

The inflationary movement[29] began during the war. In June, 1918, the dollar (parity 4.21 marks) had reached a level of 5.31 and by November, 1918, 7.43. In December, 1919, the dollar was quoted at 46.77; in December, 1920, at 73; in December, 1921, at 191; in July, 1922, at 493; in October, 1922, at 3180; in December, 1922, at 7589. On January 11, 1923, French and Belgian troops occupied the Ruhr territory, center of Germany's heavy industry, in pursuance of Mr. Poincaré's policy of "productive pledges." At once a monetary tornado broke loose: dollar quotations in January, 1923, averaged 17,972; in February, 27,918; in March, 21,190; in April, 24,457; in May, 47,670; in June, 109,996; in July, 353,412. Then the dollar quotations soared to astronomical heights: 4.6 millions in August; 150 millions on September 18; 1.2 billion on October 9; 12 billions on October 19; the trillion limit was attained on November 14.

Meanwhile the German government had devised a new money, the "rentenmark" to be issued by the Rentenbank created for this purpose.[30] One "rentenmark" was to be equal to one "gold-

27. The effects of the inflation on the practice of corporation law will be described by the writer in another study.

28. The only analytical history of these developments, and a valuable one, has been written by an American, Dawson, "Effects of inflation on private contracts, Germany, 1914-1924," 33 Mich.L.Rev. 171 (1934).

29. The most detailed tables of the depreciation of the mark in terms of foreign currencies are the *Valuta-Tabellen 1914–1927* (Frankfurter Societäts-Druckerei, 1927). Statistical material on the depreciation of the mark is contained in Bresciani-Turroni, *supra*, n. 3; Elster, *Von der Mark zur Reichsmark* (1928) [dollar quotations at p. 433]; Graham, *supra*, n. 3. The dollar quotations did not exactly reflect the purchasing power of the mark, which after the war exceeded the respective dollar value. However, the dollar movement roughly gives a picture of the process and it was of the greatest psychological significance as it was followed apprehensively by everybody.

A check drawn on Sept. 27, 1923 for 9,000,000,000 marks was the object of *Franklin v. Westminster Bank*, (C.A.1931), reported by Mann, *The Legal Aspect of Money* (1938) 315.

30. Decree on the establishment of the German *Rentenbank (Rentenbank-Verordnung)* of October 15, 1923, *R. G. Bl.* 1923 I 963, § 15. Cf. Schacht, *Stabilization of the Mark* (1927), chaps. 3 and 4; Elster, *supra*, n. 29; Baumgartner, *Le Rentenmark* (Paris, 1925); K. Mackenzie, *Banking Systems of Great Britain, France, Germany and the U. S.*,

mark", a unit of account not fluctuating with the mark. Similarly as the greenbacks until 1863,[31] the Rentenbank notes were convertible into interest-bearing bonds in terms of "gold marks." For the service of the bonds Germany's entire agricultural real property was hypothecated by law, in addition to special imposts laid for the security of the bonds upon German commerce and industry. The maximum amount of the rentenbank notes was not to exceed 2,400,000,000 "rentenmarks." The printing of Reichsbank notes was practically stopped.

The new notes were emitted on November 15, 1923. Thereupon speculation against the mark indulged in new excesses;[32] but owing to the attractive features of the rentenmark, and even more because of the scarcity of media of payments, speculation suffered a setback of such severity that the government was able to keep quotations of the dollar at the level of 4.2 trillions, which were reached on November 23, 1923.[33] That quotation corresponded to 4.2 gold marks for the dollar, or 1 trillion marks for one gold mark; it thus conformed to the pre-war mark-dollar ratio which had been 1 dollar to 4.2 marks. Once in a while the dollar soared still higher after November, 1923, and the situation remained extremely precarious for some time,[34] but finally the 4.2 trillion ratio of the dollar was successfully defended in the market until the rentenmark—in itself merely a make-shift—was replaced by the new "reichsmark." By the laws of August 30, 1924,[35]

(2d ed., 1935) 182. See also *supra*, p. 124.

31. *Supra*, sec. 42 I.

32. Regarding these critical days, see Schacht, Graham, Baumgartner, and Elster, *supra*. *In re Illfelder's Estate*, 136 Misc. 430, 240 N.Y.S. 413 (1930), aff'd 232 App.Div. 740, 249 N.Y.S. 903, makes some misleading statements regarding the rentenmark. The latter was created as early as November, 1923, and was never made legal tender.

33. It has been estimated that 60,000 to 70,000 freight cars, amounting to about 1,000 freight trains, loaded with one-mark notes, would have been necessary to pay a reichsmark. Jastrow, *Principienfragen in den Aufwertungsdebatten* (1937) 61.

The figures of the German inflation have recently been dwarfed by the Hungarian inflation of 1945/46. There 400,000 quadrillions (or quintillions?) of "pengos" were equal to one "forint." Nogaro, *La Monnaie et les Systemes Monetaires* (2d ed., 1948) 155; Bank of International Settlements, 17th Annual Report, 1946-1947, p. 69. This was a Soviet type of inflation, *supra*, n. 24. It did not give rise to such cases and juridical problems of which the Western inflations, and especially the German of 1919–1923 abound.

34. A fact that found its expression in fantastic interest rates *supra*, p. 165.

35. Especially the Coinage Act of this date. *R.G.Bl.* 1924 II 254.

the reichsmark, having the same value as the rentenmark, was made the basis of the new German monetary system.

Judicial counteraction to the inflationary havoc started in the field of pre-war executory contracts. It set in as early as the war under the pressure of the Allied Powers' blockade. When sellers of foreign material or of goods containing such material refused delivery, alleging impossibility of performance, the question arose whether there was really an "impossibility" or merely a temporary hindrance of performance. The *Reichsgericht* held for the sellers on the ground that inability to send the material through the blockade was to be treated in law as a permanent impediment, considering its long duration and the uncertainty—extreme indeed—of its termination.[36] This ruling, carefully qualified by the court,[37] constituted merely an application of well settled doctrine, and was open to adverse criticism only with respect to the formula subsidiarily employed by the court, according to which the performance promised (*e.g.*, the delivery of copper wire) had become, by force of events, an "economically different" one.[38]

This subsidiary formula, however, paved the way for the next phase of the development. There was submitted to the *Reichsgericht* a contract made in August, 1916, providing for the construction of a tug-boat to be delivered not earlier than fourteen months after the conclusion of peace. The constructor alleged that performance would drive him into bankruptcy since the expenditure for material and wages would triple the contractual price. No pre-war contract, no blockade, no confiscation of material could successfully be pleaded in this case. The court, however, on December 2, 1919, in finding for the constructor, pointed out that under the alleged conditions the performances demanded would be essentially different from the performance contracted for.[39] This was still reasoning in terms of impossibility. However, it was in fact the *clausula rebus sic stantibus* doctrine,[40] which was the basis for the decision. Before long, the court, under pressure of increasing economic troubles, resorted openly to that doctrine, which it had previously rejected as contrary to German law.[41] Reference to the *clausula rebus sic stantibus* later

36. *Reichsgericht*, Feb. 4, 1916, *R.G.Z.* 88, 71; March 27, 1917, *R.G.Z.* 90, 102; Oct. 15, 1918, *R.G.Z.* 94, 45.

37. *Reichsgericht*, March 21, 1916, *R.G.Z.* 88, 172; Jan. 22, 1918, *R.G.Z.* 92, 87; March 15, 1918, *R.G.Z.* 92, 322.

38. See the cases cited *supra*, n. 36.

39. *Reichsgericht*, Dec. 2, 1919, *R.G.Z.* 98, 18.

40. *Supra*, p. 189.

41. *Reichsgericht*, Sept. 21, 1920, *R.G.Z.* 100, 129; Feb. 3, 1922, *R.G.Z.* 103, 328.

disappeared; but there still remained the doctrine under which the seller (entrepreneur, constructor, etc.), was entitled to rescind the contract if, subsequent to the time of contracting, the original financial "equivalence" between his performance and the consideration promised was destroyed by the rise in prices, to such an extent that it was unfair to insist upon performance.[42] This proposition was derived from the broad rule of the Civil Code (§ 242) according to which the debtor "is under a duty to carry out his performance as good faith requires taking into account general usage" (*wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*). The Court, however, still made relief depend upon the fact that maintenance of the contract would lead to the financial ruin of the obligor,[43] thus preserving a relic of the impossibility doctrine. Finally this qualification was abandoned.[44] The result in 1923 was that in executory contracts the seller (or any other party obligated to deliver goods or services) was held entitled to rescind the contract because of a radical change in the market. This was not an absolute rule, however, but was qualified by a weighing of the surrounding circumstances from the angle of "good faith."[45] Generally the right of rescission was conditioned upon the vendor's offering the vendee an opportunity to concede a reasonable augmentation of the price in order to avert rescission.[46] But there was, in these preliminary phases, no direct compulsion upon the vendee to pay more than the sum promised by him; hence there was no revaluation proper.[47] To that typical sequel of pernicious inflation we shall

42. *Reichsgericht*, Feb. 3, 1922, *R.G.Z.* 103, 328; Jan. 6, 1923, *R.G.Z.* 106, 7. The doctrinal basis of the theory of the court had been prepared in legal writings, particularly by Krückmann, *supra*, p. 189, n. 76, and Oertmann, *Die Geschäftsgrundlage* (1921).

43. See *Reichsgericht*, April 16, 1921, *R.G.Z.* 102, 98 at 100, citing precedents.

44. *Reichsgericht*, Feb. 3, 1922, *R.G.Z.* 103, 328; March 24, 1922, *R.G.Z.* 104, 218.

45. *Reichsgericht*, June 7, 1921, *R.G.Z.* 102, 272.

46. *Reichsgericht*, Feb. 3, 1922, *R.G.Z.* 103, 328 at 333; Sept. 22, 1923, *J.W.* 1923, 984.

47. In case the vendee should wish to carry on the contract, the court was authorized to determine a reasonable price binding upon the parties. *Reichsgericht*, Sept. 21, 1920, *R.G.Z.* 100, 129. In *Reichsgericht*, Nov. 10, 1923, *R.G.Z.* 107, 151, involving unusual circumstances, determination, by the lower court, of a reasonable rent for an elapsed period was approved. Contrary to Dawson, *supra*, n. 28 at 207, n. 116, the decision of the *Reichsgericht*, Sept. 22, 1923, *J.W.* 1923, 984, did not hold that the lower courts were free to refuse rescission, if a reasonable price fixed by the court was not accepted.

Consideration by the court of the lessened purchasing power of the mark in the case of damages and

turn now, but the discussed theories of the German courts already exhibit a feature which we shall find even more marked in the revaluation doctrine of the German courts, namely, their (involuntary) effect of strengthening the inflationary trend. Cancellation on a large scale of obligations to deliver goods operates in this respect similarly as does the stretching of monetary obligations of debtors.

Section 14

REVALUATION

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I. Scaling Laws

Revaluation [1]—to summarize earlier statements—is a phenomenon not of money but of *debts*. It means, after inflation and the establishment of a new monetary system, a special type of the recasting of debts incurred in the former unit, namely, a recasting designed to restore, in part or in entirety, the original financial value of the debt, impaired or destroyed by the inflation. Whether there will be revaluation, and, if so, to what extent, depends upon the lawgiver. There are few policy rules to guide him in this momentous and intricate task. First of all, it is desirable to take into account, for revaluation purposes, the time when the debt was contracted. Obviously, in a progressive inflation the original value of the debt is definitely linked to the time of the origin of the debt. For this reason revaluation is frequently accomplished by "scaling" laws. Such laws appear as early as the Middle Ages.[2] The most famous scaling laws are probably

other "adaptable" claims likewise developed within this period, but that process was juridically independent of revaluation. *Supra*, p. 185.

1. Other writers prefer the word "revalorization." Still, "valorization" has assumed the meaning of "act or process of attempting to give an arbitrary market value to a commodity" (Webster). "Revaluation" is also simpler linguistically.

2. Particularly in France after the fourteenth century. Hubrecht, *supra*, p. 171, n. 1, at 52; Landry, *Essai Economique sur les Mutations des Monnaies dans l'Ancienne France* (1910). An ordinance of Henry II of December 15, 1421, was outstanding, *Les Ordonnances des Rois de France* XI, 143; Mater, *Traité Juridique de la Monnaie et du Change* (1925) 121.

those which were enacted in France following the breakdown of the paper currency of the Great Revolution,[3] the scaling laws of the several American states after the experience with the Continentals,[4] the laws adopted after the Civil War by various southern states for the regulation of Confederate currency debts,[5] and the Austrian scaling laws of 1811–1813.[6]

The American scaling laws of the Continentals period took as a basis the value of the Continentals in terms of silver at the time of contracting, ordinarily fixing a single ratio for each month.[7] The French revolutionary legislation, however, besides differentiating the ratios of revaluation according to the various *départments,* did not rely solely on the price of specie, but used, as the basis of revaluation, average figures computed from approximate prices paid for specie, for real estate, and for goods and wages.[8] It is remarkable that in the United States likewise a tendency appeared to overcome the strict metal-value rule. Chief Justice Marshall in *Faw* v. *Marsteller,*[9] interpreted the phrase "true value in specie", used by the Virginia scaling law, to the effect that the difficulty in obtaining gold and silver coin at the time should be disregarded, and "the real value of property" employed in the determination of the debt. Although the affirmative part of this ruling is not very clear, an antimetallistic attitude is distinctly present.

3. Hargreaves, *Restoring Currency Standards* (1926) 26; Marion, *Histoire Financière de la France* II (1914); Mater, "La dépréciation du papier-monnaie et ses consequences juridiques de 1790 a 1800," *Revue du Droit Bancaire* 1924, pp. 72, 168, 266, 367; id., *Traité Juridique de la Monnaie et du Change* (1925) 112.

4. *Infra,* sec. 41 I.

5. *Infra,* sec. 42 III.

6. Hargreaves, *supra,* n. 3, at 73; Winiwarter, *Handbuch der Justiz- und Politischen Gesetze* I (1829) 3, secs. 13 et seq.; Hofmann, "Die Devalvierung des Oesterreichischen Papiergeldes im Jahre 1811," *Schriften des Vereins für Sozialpolitik* CLXV (1923).

Some other instances may be mentioned briefly. The Prussian *Finanzedict* of March 29, 1764, by which Frederick the Great created the new Prussian "thaler," scaled the existing debts according to the time of contracting, *Novum Corpus Constitutionum Prussico-Brandenburgensium* III, 381, § 10; von Schrötter, *Preussisches Münzwesen in 18 Jahrhundert* III (1910) 199. Again, when Denmark, by decrees of January 5 and 15, 1813, replaced the depreciated "Riksdaler Courant" by a new "Riksdaler," the value of which was fixed at somewhat less than two-thirds of the original metal value of the "Riksdaler Courant," scaling rules were provided, partly based on exchange quotations. *Kongelige Forordninger* XVI 237, 259, 270.

7. Hargreaves 1.

8. Hargreaves 49; Caron, *Tableaux de Déprèciation du Papier-Monnaie* (1909) and the writers cited in n. 3.

9. 2 Cranch. (6 U.S.) 10, 2 L.Ed. 191 (1804).

Another desirable policy is not to reopen transactions closed by payment or equivalent acts ("executed" transactions), but deviation from this norm was a conspicuous feature of the German revaluation law of 1924.[10]

II. German Revaluation—A) Judicial

German revaluation, put through since 1923 over a period of approximately ten years,[11] requires separate and more detailed discussion. It represents one of the most dramatic chapters in the history of private law, raising fundamental problems which will give material for thought to generations to come. Prior to the German events the very concept of revaluation, despite all scaling laws, had not yet been discovered by legal or economic science. No adequate inquiry into the subject is possible without a close study of the German experience.

The death-blow inflicted upon the mark by the Ruhr invasion led to the finale of the monetary catastrophe. Debts worth billions had evaporated. In this turmoil the Fifth Senate of the *Reichsgericht,* reversing the Court's earlier attitude, ordered revaluation of debts through the epochal judgment of November 28, 1923,[12] adopting a theory enunciated by lower courts.[13] Before rendering the judgment the Senate had procured the consent of the other Civil Senates, a proceeding not provided by the judicial code.[14]

It was again the conception of "good faith" to which the court resorted.[15] That conception was now given preference

10. *Infra*, p. 207. Another exception (South Carolina, 1780) was the result of particular circumstances. *Infra*, sec. 41, n. 8.

11. Cf. Dawson, *supra*, p. 200, n. 28. For critical interpretations of the German movement, see Klang, *Geldentwertung und Juristische Methode* (1925); Nussbaum, *Bilanz der Aufwertungstheorie* (1927); Jastrow, *Prinzipienfragen in den Aufwertungsdebatten* (1937). Annual reports concerning cases and writings are to be found, since 1924, in *Jahrbuch des Deutschen Rechts.* Ample literary material, on the whole without lasting interest, is collected in Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch*, II (9th ed., 1930) 49, 55, 59. See, furthermore, the general literature on judicial revaluation, *infra*, p. 17.

12. *R.G.Z.* 107, 78. Since a mortgage was involved in the case, the court ostensibly confined its judgment to mortgages, but under the theory announced, this reservation had no practical significance.

13. Particularly by App. Darmstadt, March 29, 1923, and May 18, 1923, *J.W.* 1923, 459 and 522.

14. Oertmann, *Die Aufwertungsfrage bei Geldforderungen, Hypotheken und Anleihen* (1924) 40.

15. This was the basis of the opinion which in many words offered little substance, and it was the only ground finally adhered to in the course of further developments.

over the legal tender rules. These rules having been discarded by the court, there was no longer any bar to the crushing superiority of the good-faith principle. Previous payments in depreciated money were held not to have discharged the debt.[16] This led to a revival, on a tremendous scale, of debts paid off and receipted; and this process was rigorously extended to nullify or override waivers,[17] accounts stated,[18] compromises,[19] *res judicata*,[20] and the defense of the statute of limitations.[21] In the name of "good faith", retroactivity was driven back through the past as far as 1920.[22] Thus, in addition to all existing debts, past debts likewise became the subject of controversy between creditor and debtor with no direction for settlement. For there was no guidance except the broad pronouncement that the solution of the controversy must conform to good faith. Revaluation was not carried out by the German courts along lines comparable

The court, however, in this first judgment, advanced also a "supplementary" interpretation of the intent of the parties who, the court points out, would have decided for revaluation in case they had foreseen the depreciation of the mark. This argument concluding from the intent of the parties what the court had previously put in before, was later abandoned by the court as was the reference to § 607 of the Civil Code, *supra*, p. 156, n. 89. See also Heck, *Archiv für die Civilistische Praxis* CXXII (1924), 203 at 208, who remarks that the court did not mention its previous decisions running counter to the new doctrine, nor pay attention to the public interest involved in the legal tender laws.

16. *Reichsgericht*, March 13, 1925, *R.G.Z.* 110, 65 at 78; Dec. 3, 1924, *J.W.* 1925, 45, and numerous other cases referred to in Staudinger, *supra*, n. 11 at II, 64.

17. *Reichsgericht*, May 7, 1927, *R.G.Z.* 116, 313; June 11, 1927, *R.G.Z.* 117, 226.

18. *Reichsgericht*, Oct. 30, 1928, *R.G.Z.* 122, 200, 206.

19. *Reichsgericht*, June 11, 1927, *R.G.Z.* 117, 226.

20. *Reichsgericht*, Dec. 15, 1928, *R.G.Z.* 123, 66, giving references. Administrative decisions were likewise exploded. *Reichsgericht*, Oct. 24, 1928, *R.G.Z.* 122, 167.

21. *Reichsgericht*, June 22, 1925, *R.G.Z.* 111, 147; Nov. 10, 1926, *J.W.* 1927, 983, no. 17.

22. *Reichsgericht*, Jan. 16, 1926, *R.G.Z.* 112, 324; May 25, 1927, *J.W.* 1927, 1853, no. 33, giving references; Nov. 22, 1927, *J.W.* 1928, 494 [condemnation money paid in 1919], and Dec. 15, 1927, *J.W.* 1928, 158. [The judgment of Nov. 22, 1927, shows that retroaction was extended to "adaptable" debts.] At one time the Second Civil Senate of the *Reichsgericht* made a desperate effort to dam up the flood by setting up August 15, 1922, as a backward limit to retroaction, but this arbitrary demarcation was not approved by the other Senates and was finally abandoned by the Second Senate. So arbitrariness as to retroaction was reëstablished, creative of thousands, perhaps hundreds of thousands of controversies. See Nussbaum, *Bilanz der Aufwertungstheorie* (1929) 24; Dawson, *supra*, p. 200, n. 28, at 236.

with Anglo-American equity, that is, by means of definite equitable rules of law; the *Reichsgericht,* consistently with its theory, urged upon the lower courts the view that "revaluation is not a legally defined concept" (*kein rechtlich bestimmter Begriff*")[23] and that the judge must decide exclusively with an eye to the individual circumstances of the case, considering "all the *interests*" of the parties,[24] all of the ascertainable facts.[25]

Sometimes the fact that the price had depreciated to a half or quarter of its former value at the time of contracting was held sufficient justification for revaluation;[26] but this did not hold good in other cases.[27] Concerning the amount to be awarded, the *Reichsgericht* categorically refused to set up any standard. The lower courts were told to use, at their discretion, singly or in combination, as principal or subsidiary gauge, the dollar value,[28] the index of living costs, and of wholesale prices,[29] the market prices of individual goods,[30] or a special index privately elaborated by a member of the *Reichsgericht* (Zeiler);[31] but none of these measures were to be conclusive.[32] Among other facts, the

23. Thus the important decree of the Assembled Senates *(Plenarbeschluss)* of May 31, 1925, *R.G.Z.* 110, 371. "Objections" (against giving revaluation beyond dollar parity), the court said, "cannot be derived from the concept of revaluation, since revaluation is no legally distinct concept at all." A remarkable confession. In *Kornatzki* v. *Oppenheimer,* [1937] 4 All. E.R. 133 (Ch., 1937), commented on 54 L.Q.Rev. 175 (1938), the court felt that German revaluation was a question of "fact" rather than of "discretion". However, revaluation was invariably the subject of decisions of the *Reichsgericht,* which only decided questions of *law.*

The foregoing statement does not overlook—as assumed by Schoch, *supra,* p. 188, n. 70, at 308—the fact that to an English court any foreign law is "fact". In the *Kornatzki* case the Court used the word "fact" in a narrower sense.

24. *Reichsgericht,* Nov. 28, 1923, *R.G.Z.* 107, 78; decree of the Assembled Senates in preceding note.

25. *Reichsgericht,* Feb. 21, 1924, *R.G.Z.* 108, 83.

26. Judgment of Oct. 25, 1927, *J.W.* 1928, 159, no. 12; Dec. 6, 1927, *J.W.* 1928, 1384; Jan. 16, 1928, *J.W.* 1928, 1800.

27. According to a judgment of Jan. 5, 1925, *J.W.* 1925, 467, revaluation would have to take place where "the stipulated sum of paper money, compared with the value of the consideration received, either is devoid of significance or is of minimum economic value."

28. *Reichsgericht,* Oct. 13, 1925, *R.G.Z.* 111, 375.

29. Judgment of Feb. 8, 1924, *J.W.* 1924, 804; *Reichsgericht,* Nov. 12, 1924, *R.G.Z.* 109, 158; Assembled Senates, May 31, 1925, *R.G.Z.* 110, 371, 379.

30. Judgment of Jan. 16, 1928, *J.W.* 1928, 1800.

31. Assembled Senates of May 31, 1925, *R.G.Z.* 110, 371, 379.

32. This was frequently pointed out. See, *e. g.,* Assembled Senates, May

financial situation of the parties was to be considered, on the theory that the impecunious debtor should pay less than the moneyed debtor, and that the wealthy creditor should not be treated as favorably as the poor one.[33] For this purpose the financial situation of the parties had to be considered not only with respect to the end of the inflationary period, but also with respect to the subsequent financial fate of the parties.[34] Thus the parties in ordinary debt litigation were compelled to disclose their financial status and its vicissitudes.

To these difficulties of fact were added almost insoluble juridical problems. They originated chiefly in the Conflict-of-Laws field where conditions turned truly chaotic,[35] in the necessity of giving the owner of mortgaged real estate recourse against his predecessor upon revaluation of the mortgage,[36] and finally in the attempts of the *Reichsgericht* to curtail litigation by the development of an estoppel *(Verwirkung)* doctrine of an entirely novel kind.[37] Stipulations were sometimes inserted in contracts to the effect that the parties subjected themselves to a foreign jurisdiction "in order to escape revaluation".[38]

Some figures may illustrate what has been said. In his budget report of 1926, the Prussian Minister of Finance mentioned that it had been necessary as a result of revaluation to appoint more than three thousand officials, permanent and auxiliary, to the Prussian courts.[39] A figure of five thousand for all of Germany

31, 1925, *R.G.Z.* 110, 371; *Reichsgericht*, Feb. 18, 1927, *R.G.Z.* 115, 201, 204; June 29, 1926, *J.W.* 1926, 2619, no. 3; Jan. 16, 1928, *J.W.* 1928, 1800.

33. In the first place, financial circumstances of the debtor were taken into account, but the situation of the creditor was also to be considered. See, *e. g.*, *Reichsgericht*, May 7, 1927, *R.G.Z.* 116, 313, 317; Dec. 15, 1927, *J.W.* 1928, 158; April 14, 1928, *J.W.* 1928, 1819.

34. *Reichsgericht*, Jan. 15, 1929, *R.G.Z.* 123, 371; Sept. 22, 1928, *J.W.* 1929, 664.

35. *Infra*, p. 355.

36. On the implications of this so-called *Ausgleichsanspruch* (indemnification claim) of the owner, see Staudinger, *supra*, n. 11, at II, part 3 (1929) 1668.

37. The creditor was held excluded from retroactive revaluation unless he had demanded it within a reasonable time after the retroaction-ruling had become generally known. This had happened, according to various judgments, in 1924, or in 1925, or in 1926, or in 1927. Staudinger, 656; Nussbaum, *supra*, n. 11, at 38.

38. *Reichsgericht*, May 16, 1926, *J.W.* 1926, 1336. The contract was between a German and a foreigner, but the court acknowledged that the German party might also have had an interest in avoiding revaluation.

39. Among those appointees there must have been considerably more than a thousand judges. The Prussian "revaluation departments" (see next note) alone were tenanted,

is probably not an exaggeration. Litigation, as if to imitate the scale of depreciation, rose to millions of cases.[40] Three reporter systems were created for revaluation cases alone;[41] the *Reichsgericht* itself rendered considerably more than two thousand judgments on revaluation[42] during a period of about ten years.[43] Nearly half of them reversed the decisions of the lower appellate courts, thus evidencing the bewilderment of the judiciary.[44]

The whole picture was one of thoroughgoing judicial aberration and confusion. A prominent German lawyer, at the 1925 meeting of the German Lawyers Association, accurately characterized the situation when, "to the tumultuous applause of the audience," he asserted that "the courts, under the revaluation doctrine, are running into the danger of becoming institutions to dis-

on May 1, 1927, by 849 judges which number was reduced, on Jan. 1, 1928, to 442.

40. Special revaluation departments *(Aufwertungsstellen)* were instituted with the lower courts of general jurisdiction *(Amtsgerichte)*. Revaluation Law of July 0, 1925, *R.G. Bl.* 1925 I 117, at 130, § 69 *et seq.* They had to decide in summary proceedings, certain controversies turning on the amount and other terms of statutory revaluation. *Infra*, p. 213. Their main business consisted in adjudicating motions for individual reduction or augmentation of the 25 per cent standard revaluation of mortgages and, later on, in adjudicating motions of mortgagors for the granting of a moratorium. On Jan. 20, 1928, 2,864,217 cases had been brought before the Prussian revaluation departments, 2,773,595 of which were then disposed of, a tremendous achievement of the Prussian judicial bureaucracy. In Bavaria, on December 31, 1927, 98.17 per cent of the revaluation-department cases, totalling 522,056 had been disposed of. Nussbaum, *supra*, n. 11, at 17. Other revaluation cases, particularly those involving "free revaluation"—*infra*, p. 212 were dealt with by the ordinary law courts. There are no statistics concerning these but it is certain that up to 1932 they were the most burdensome part of the revaluation business. See *infra*, ns. 42 and 43.

41. *Die Rechtsprechung in Aufwertungssachen; Die Aufwertungspraxis; Aufwertungsfälle beim Reichsgericht* (edited by Zeiler, member of the *Reichsgericht*, 11 volumes). There were, in addition, an *Aufwertungs-Kartei* using a loose-card system and a more popular weekly, *Die Aufwertung*.

42. In Zeiler's reports there were collected under 2327 headings about 2,000 revaluation judgments of the *Reichsgericht* up to 1930 inclusive. The reports were then discontinued.

43. The number of revaluation cases decided in 1932 was still considerable, see *Jahrbuch des Deutschen Rechts* for the year 1932 (1933) 313. Pertinent cases appeared as late as in that *Jahrbuch* for 1936, at 376. However, the figures since 1933 are no longer comparable, because of the formidable decline of judicial litigation after the establishment of the Hitler government.

44. Zeiler, *Aufwertungsfälle vom Reichsgericht* (1931), Preface to Vol. 11.

tribute the goods of life in accordance with ethical points of view." [45] And the Supreme Court of Austria, in rejecting judicial revaluation, stated that its effect consists in making the court's personal notions of equity and its ideas concerning the most intricate general conditions, the law of the land, and that the courts would thereby "lose the ground under their feet." [46]

III. German Revaluation—B) Statutory

The course of the *Reichsgericht* placed the German government in a serious situation. The government was aware that, while inflation went on, there was no chance for successful legislative action. This would have required a carefully defined "recasting" rule in a law creating a new and stable currency. Nevertheless, the court was about to force a sweeping and economically ill-considered policy on the country, which would thus become a judicial battleground, in addition to its other troubles. Remedial legislation was clearly indicated. However, when it became known that the government intended to take counter-measures, the board of the "Association of the Judges at the *Reichsgericht*", on January 8, 1924, protested in a remarkable public declaration.[47] These high judges declared that they had learned of the intended legislation with amazement.[48] The "good faith" principle on which the *Reichsgericht's* decision of November 28, 1923, rests, the declaration asserted, was superior to any "individual statutory rule". The judges warned the government that invoca-

45. *J.W.* 1926, 232, annex p. 14 (Address of Mr. Hoeck of Hamburg). German writers opposed to the doctrine of the *Reichsgericht* are listed in Nussbaum, *supra*, n. 11, at 8.

46. Judgment of March 12, 1930, *Die Rechtsprechung* 1930, 105, referring to the objections to judicial revaluation raised by the writer in *Das Geld* (1925) 125.

47. *Deutsche Richterzeitung*, 1924, 7; *J.W.* 1924, 90. The association was of a private nature, yet doubtless representative of the body of the *Reichsgericht's* judiciary. No objection to the declaration which was signed by Mr. Lobe, President of a Senate of the *Reichsgericht*, was voiced by a member of the court. On January 1, 1925, President Lobe published an article, containing strictures upon the government, under the suggestive title *"Der Untergang des Rechtsstaates"* [Downfall of government by law] (*Deutsche Juristenzeitung* 1925, 15). However, it was certainly not the democratic government which wrought the end of the government by law; on the contrary, never in German history were the functions and authority of the courts so extended as they were by this government. The entire misappreciation by the high judge of real conditions revealed his bias and passion. A similar mental attitude prevailed within the judiciary and the nonjudicial bureaucracy. See *infra*, n. 56.

48. This is a translation of *Befremden* which, however, has a connotation of reserved blame not exactly translatable.

tion by a party of the planned legislative measures might be rejected by the court as a violation of good faith, and that possibly such legislation in itself might be considered as such a violation, as "immoral," and as unconstitutional, even if the government should forbid revaluation only partially. In this connection the justices contrasted the court's feeling of responsibility,—allegedly revealed by the judgment of November 28, 1923,[49]—with the apparent moral insensibility of the government and the apprehension felt by the declarants that the government might yield to powerful and "selfish" interests.

The declaration is all the more impressive in view of the fact that the German judiciary was always subordinate to the legislature. In a long and bitter struggle, the epoch of liberalism had secured for the courts independence from the commands of the monarch. However, subordination of the judiciary to *legislation* had evolved as a well-settled rule, consonant with the constitutions of the several states and actually followed without hesitation. There was neither a Chief Justice Marshall nor a Due-Process clause. Still, the democratic German government of 1924 possessed little authority. Arisen from defeat and revolution, and incessantly humiliated by foreign powers, formers of world opinion, it failed to impress justices educated in the proud tradition of centuries-old monarchic bureaucracy. They were hardly convinced of the continuity or even of the legitimacy of German democratic government. At the same time this government, as required by its principles, not only refrained from interference with the personnel of the court but also felt bound to hearken to the voice of judicial authority. Certainly it did not plainly and simply surrender in face of the threatening declaration of the judges; still, it did not dare to challenge the principle of judicial revaluation, henceforth called "free" revaluation because it was not put under any definite limits as was "statutory" revaluation. Statutory revaluation was confined, by various enactments and decrees,[50] to investments, and affected particularly

49. See, however, *supra*, n. 15.

50. Legislative revaluation was inaugurated by the Third Emergency Tax Ordinance *(Dritte Steuernotverordnung)* of Feb. 14, 1924, *R.G. Bl.* 1924 I 74. There an attempt was made to keep revaluation within bounds and to use the profits of the real estate owners and of other "disburdened" debtors for taxation purposes. But this scheme was soon defeated by the revaluation party. The Third Emergency Tax Ordinance was replaced by the Revaluation Law *(Aufwertungsgesetz)* of July 16, 1925, *R.G.Bl.* 1925 I 117, which became the center of a large body of legislation aimed at revaluation of investments. The leading commentators of the Revaluation Law were Michaelis, Quassowski, Schlegel-

mortgages (revaluation rate 25 per cent) and industrial bonds (revaluation rate 15 per cent); mortgage bonds, life insurance, and savings bank accounts were revalued, by appropriate proceedings, to the extent of the reserves held by the debtors for the protection of the holders of such rights.[51] For mortgages, by far the most important revaluation item,[52] retroactive revaluation was expressly allowed, where payment had been made in the period from June 15, 1922, to February 14, 1924, or where the creditor had reserved his "rights", thus rewarding him for his disregard of the legal tender law.[53] Revalued debts were declared to be gold-mark debts in order to protect them (as far as words could) from the influence of another inflation. Special provision was made for a slight revaluation of the public debt. Ordinary bank accounts[54] and, of course, the old mark-currency notes were excluded from revaluation.

The legislative measures considerably narrowed the field of litigation. The judgment of November 28, 1923, had announced the necessity for distinguishing between mortgages on agricultural, industrial, and urban real estate, as well as the necessity for considering the various public charges upon real estate, the statutory emergency protection of lessees, etc. All these differentiations were eliminated by the legislature. It is difficult

berger & Harmening, and Neukirch. More systematic was Mügel, *Das Gesamte Aufwertungsrecht* (5th ed., 1927).

Back of revaluation was the "recasting rule" of the German Coinage Laws of August 30, 1924, *R.G.Bl.* 1924 II 254, § 5, par. 2, providing, in accord with the actual level of stabilization *(supra*, p. 201) that in the payment of debts a trillion marks should be equal to a reichsmark (dollar parity 4.2 trillion marks).

51. This rule developed a considerable importance in the international field. Before the War, several leading American life insurance companies, under a license of the German government, had established German branches which issued their policies on a mark basis. After the collapse of the mark, the insured demanded "free" rather than the limited statutory revaluation which, they claimed, was reserved to German companies. The German courts, however, decided in favor of the American companies. *Reichsgericht*, Dec. 13, 1929, *R.G.Z.* 127, 20; March 10, 1931, *R.G.Z.* 131, 350. The interests involved in the question amounted to more than a hundred million dollars.

52. Mortgages on German real estate before the war totaled more than 60 billion marks, amounting to about 20 per cent of the entire national wealth. Cf. the writer's, *Lehrbuch des Deutschen Hypothekenwesens* (2d ed., 1921) 201.

53. The attitude of American legislatures and courts after the collapse of the Continental currency was entirely opposite. *Infra*, sec. 41 I.

54. Revaluation Law § 66.

to imagine what the result would have been had the government not succeeded in this respect.[55]

The historic significance of the German events was a revolt of the judiciary against the democratic government. In a moment of unwitting self-revelation, the court called its new doctrine "revolutionary emergency law." [56] A distinctly irrational feature nurtured by the political undercurrents came to light in the whole revaluation movement, especially with its more vociferous partisans.[57] Even the *Reichsgericht* forgot itself so far as to assert that the judgment of a Danish court, the enforcement of which the *Reichsgericht* refused, was "based on immoral grounds and offered a morally wicked argument," for no other reason than because the Danish court had refused revaluation to the German

55. Attempts were made to challenge statutory limitations of "free" revaluation as unconstitutional. They were rejected by the *Reichsgericht*, March 1, 1924, *R.G.Z.* 107, 370; Nov. 4, 1925, *R.G.Z.* 111, 320. In the first case the court held justifiable the concern of the government that revaluation would lead "to a multitude of litigation hard to overcome" and would result in long-lasting uncertainty and jeopardy to real estate credit (a mortgage situation was involved in the case). The court concluded therefrom that legislative intervention was reasonable. Such discernment had appeared neither in the judgment of Nov. 28, 1923, nor in the pronunciamento of the judges' Association. It implied a belated recognition of the incompetence of the judiciary. The "Due-Process" language of the court, which had not the slightest basis in the Weimar Constitution, was noteworthy.

56. Judgment of Jan. 23, 1926, *Seufferts Archiv* LXXX 102. A national-socialist writer, Franzen, *Gesetz und Richter nach den Grundsätzen des Nationalsozialistischen Staates* (1935) 33, stated approvingly that the course of the *Reichsgericht* was brought about by the court's "distrust of democratic legislation". Regarding the general attitude of the German judiciary under the German Republic see Fr. Neumann, *Behemoth* (2d ed., 1944) 20. The political problem involved in judicial revaluation is ably discussed by Dessauer, *Recht, Richtertum und Ministerialbürokratie* (1928); and by Grau, "Rechtsprechung oder Gesetzgebung zur Anpassung des Privatrechts an die veränderten Verhältnisse", *Archiv für die Civilistische Praxis* CXXII (1924) 318.

Professor Pergament of Leningrad in *Zeitschrift für Ostrecht* 1930, 87, hails the "revolutionary" proceeding of the *Reichgericht*, revolution being the ultimate remedy against unjust and oppressive legislation. This was probably not the Soviet government's theory of the functions of the judiciary.

57. E. g., Professor Stampe, leading sponsor of revaluation entitled his review of the present author's book, *Das Geld*, "Stricken with Blindness," and intimated that "international big finance" was behind nominalistic theories. The "augurs in London, Paris and New York" would find it hard to suppress their "shouts of joy" on seeing an "honest German scholar" advocating nominalism. *Die Aufwertung*, June 19, 1925.

mortgagee of Danish, formerly German, real estate.[58] What happened was a judicial manifestation of the "disequilibrium" described by Professor Robbins, an ominous deviation from a great law and a great tradition.[59]

IV. Judicial v. Statutory Revaluation

The German experience is the only example of revaluation initiated and dominated by the judiciary on the basis of the general contract law.[60] In a few instances legislatures conferred upon courts the power to revalue. Leaving aside some early colonial statutes of narrowly limited scope,[61] the instances are related to

58. Judgment of June 25, 1926, *R.G.Z.* 114, 171, rendered on a motion for the enforcement of the Danish judgment. The phrases used were *"auf unsittlicher Grundlage"* and the judgment *"begründet die Forderung in sittlich verwerflicher Weise."*

59. Kant, in his *Metaphysische Anfangsgründe der Rechtslehre* (1797) XI, discusses the case of a servant who, at the end of a year, was paid his annual wages in debased coin which would not give him the same purchasing power as the coin had at the time of contracting. Kant decides that *in law* (as distinguished from a non-legal equitable point of view) the servant would not be entitled to relief in the absence of a contractual provision to the contrary; *a court being without authority to adjudicate a case on undeterminable grounds.*

60. After the incorporation of Alsace-Lorraine into France (1920), the courts of these provinces had, for some time, to apply subsidiarily German law in monetary litigation under French transitional decrees. On the basis of the latter, revaluation according to German conceptions was granted in exceptional cases, for instance, by the *Trib.Civ.* Strasbourg, July 7, 1927, *Répertoire Pratique de Droit et de Jurisprudence d'Alsace et Lorraine* for 1927 (1928) 17. This does not mean, of course, that French courts had adopted revaluation as a theory of their own as some writers have assumed. It may be added that under a law of Nov. 26, 1918, mark debts *of French creditors* were converted into franc debts, App. Colmar, July 11, 1928 and Oct 21, 1928, *Revue Juridique d'Alsace et de Lorraine* X (1929) 29, 25.

The Supreme Court of Peking, May 5, 1924, and April 14, 1926, tr. in *D.P.* 1928 II 93, set forth the view that the loss through depreciation should be divided equally between debtor and creditor, but this interesting and perhaps wise idea was obfuscated by strange limitations and implications. See the annotation by Professor Escarra, expert on Chinese law, *ibid.* The judgment brings no elucidation to the legal systems of Western civilization.

61. In 1742, under Governor Shirley, Massachusetts made a novel sort of bills of credit ("new tenor") legal tender. In case of depreciation of these notes, it was provided that judgments should be rendered either in terms of silver or in the bills with due allowance for depreciation. Under a law of 1747, Mass. Laws 1747, c. 1, it was further prescribed that, in determining the allowance, regard should be had not only for the price of silver and of bills of exchange, but of provisions and other necessities of life. The system seems not to have functioned well. Fisher, "The tabular stand-

the German experience. Poland and Hungary both of which had gone through heavy inflation after World War I, enacted such laws without, however, giving the courts similar broad powers as the German judiciary had usurped.[62] Soviet tribunals after World War I sometimes granted, on broad legal grounds, indemnification for ruble depreciation in lawsuits between *government* institutions [63] but general revaluation was out of the question.[64]

ard in Massachusetts history," 27 Qu.Journ.Econ., 417, 426 (1913); Lester, *Monetary Experiments* (1939) 152. Furthermore, when Maryland, in 1780, decided to exchange "Continentals" held by her citizens at a ratio of 100:3 for new Maryland bills, the legislature provided that in case of depreciation of the new bills, a judicial body should be authorized to fix, for certain periods, the rate at which the new bills must be taken in payment. Md. Laws 1780, c. 8, § 18.

62. In Poland, the Polish "mark" instituted during World War I by the German occupational authorities and taken over by the Polish government after Germany's defeat depreciated to one 1,800,000th and was, on this basis, converted into the *zloty* by a decree of Jan. 20, 1924, *Dziennik Ustav* 1924, 88. Since 1922 the Polish Supreme Court had given relief to creditors of "adaptable" debts and to the debtors of executory contracts. Moreover, the court, by a judgment of Feb. 26, 1922, tr. *J.W.* 1923, 332, dismissed the claim of a mortgagor to have the mortgage stricken out in the land-book upon paying-off the nominal amount of the debt. However, the court did not claim the power of determining the amount to be paid; it rather pointed to a future legislative recasting rule promised by a law of May 9, 1919. *Dziennik Ustav* 1919, 489. This rule was laid down by the decree of 1924. Relying somewhat on German legislation it extended revaluation to loans and commercial credits, and allowed revaluation of paid-off debts where the creditor had reserved his rights. Kuratow-Kuratowski, "Les problèmes de la baisse du mark polonais dans le domaine du droit privé", *Bulletin de la Société de Législation Comparée* LIV (1925) 96; W. Müller in *Ostrecht* 1926, 1042 at 1046. Rukser in *Zeitschrift für Ostrecht* 1930, 321, mentions "the prudent self-restriction of the Polish courts in the administration of the revaluation provisions".

In Hungary, where the crown had depreciated to 1/4000th, the courts extensively granted compensation for loss through depreciation in the case of adaptable claims, including claims for "delay" damages, but did not proceed to a general revaluation of debts. See the cases translated in *Zeitschrift für Ostrecht* 1926, 1111. Definite regulation was directed through an Act of April 1, 1928, rejecting "free" revaluation and strictly limiting statutory revaluation. *Rechtsvergleichendes Handwörterbuch* (ed. by Schlegelberger, 1929), "Aufwertung," at 304; Sarrazin, "Ungarns Stellung zur Aufwertung," *Bank-Archiv* XXVII (1928) 414.

63. Bloch, "Zur Frage der Währungsstabilisierung und der Aufwertung im Sowjetrecht" [tr. from the Russian], *Ostrecht* 1927, 249. Non-Russian courts have almost invariably recognized the absence of revaluation in the Russian law. See *Tillman* v. *Russo-Asiatic Bank*, 51 F.2d 1023 (C.C.A.2d, 1931), *cert. den.* 285 U.S. 539, 52 S.Ct. 312, 76 L.Ed. 932 (1932).

64. *Tillman* v. *National City Bank*,

As a matter of fact, despite the German precedent, judicial revaluation has been generally rejected by courts [65] as well as by writers,[66] but there is, or was still a group of writers leaning toward it.[67] Their arguments are in most cases impaired by want

118 F.2d 631 (C.C.A.2d, 1941), *cert. den.* 314 U.S. 650, 62 S.Ct. 96, 86 L.Ed. 521 (1941); *Parker* v. *Hoppe*, 258 N.Y. 365, 179 N.E. 770 (1932); more distinctly, *Dougherty* v. *Equitable Life Assur. Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934); *Klochkov* v. *Petrogradski Bank*, 239 App.Div. 687, 268 N.Y.S. 433 (1934), *aff'd* 266 N.Y. 596, 195 N.E. 216 (1935), *cert. den.* 296 U.S. 583, 56 S.Ct. 101, 80 L.Ed. 412 (1935); *Perry* v. *Equitable Life Assurance Soc.*, 45 T.L.R. 468 (K.B., 1929); Mixed App. Alexandria, June 23, 1927, *Revue du Droit Bancaire* 1928, 356; Cass., Feb. 25, 1929, *J.D. Int.* 1929, 1306; App. Paris, May 23, 1931, *ibid.*, 1932, 441; Superior Court Zurich, Dec. 18, 1928, *ibid.*, 1930, 1159. German courts, too, held ruble debts not revaluable under Russian law. *Reichsgericht*, Dec. 13, 1929, *Warneyers Rechtsprechung*, 1930, 78; App. Kiel, May 10, 1930, *J.W.* 1931, 156. In *Reichsgericht*, June 2, 1930, *Leipziger Zeitschrift*, 1931, 384, a ruble debt between German parties was revalued through application of German law. See also Roumanian Cass., May 12, 1924, *J.D. Int.* 1925, 818 (Bessarabian case, Tsarist law). The only exception is *Buerger* v. *New York Life Assur. Co.*, 43 T.L.R. 601 (C.A., 1927), Lord Scrutton dissenting, where the court relied on a defective expertise on Russian law, see Freund, *Zeitschrift für Ostrecht*, 1927, 1379. The situation is now clarified by the expertise in the *Perry* case, *supra*.

65. The negative attitude is ordinarily implicit. Revaluation was explicitly rejected by the Austrian Supreme Court, *supra*, n. 46. Numerous references to Austrian and Czecho-Slovakian cases, practically all strictly nominalistic, are found in Wahle, *Das Valorisationsproblem in der Gesetzgebung und Rechtsprechung Mitteleuropas* (1924).

66. The anti-revaluation (nominalistic) point of view entirely prevails in legal literature. Special studies in point are those by Guisan, Gény, Henggeler, Rosset and Piret, *supra*, n. 1.

67. Among them are Hubrecht and Eckstein, *supra*, p. 171, n. 1, Wahle, *supra*, n. 65 and Stampe, *supra*, n. 57. Stampe has adduced historical, chiefly French material, in support of his theory. "Das Deutsche Schuldentilgunsrecht des 17. Jahrhunderts," *Sitzungsberichte der Preussischen Akademie der Wissenschaften (Philologisch-Historische Klasse)* 1925, 2, and a number of studies by the same writer, *ibid.*, 1926, 37, and in the *Abhandlungen* of the same *Akademie* (and the same *Klasse*) 1928, 1931, and 1932. Stampe proves no more than that the nominalistic doctrine of debts developed only gradually after the Middle Ages—which is not a matter of controversy—and he definitely misinterprets Molinaeus to whom he erroneously imputes a purchasing-power or "current-value" theory similar to Savigny's, *infra*, p. 219; *cf.* also *infra*, p. 267, n. 32. See on Stampe's theories, Ascarelli, *La Moneta* (1928) 293; Jastrow, *Die Prinzipienfragen in den Aufwertungsdebatten* (1937) 100; Taeuber, *Molinaeus' Geldschuldlehre* (1928) 34. Another remarkable sponsor of the revaluation theory was the Chief President of the Austrian Supreme Court, Dr. Roller, in his monograph, *Geld-*

of discrimination between judicial and legislative revaluation and between ordinary debts and "adaptable" obligations; not infrequently has even conversion of foreign currency into domestic currency been confused with revaluation.[68]

However, apart from all technically legal considerations, there is a fundamental objection to judicial revaluation not authorized and directed by enabling legislation. Such revaluation must necessarily resort to vague equitable notions which can never provide a good basis for solving the multitudinous and grave legal problems involved. One has to remember that the *Reichsgericht*, a court embracing seven "Civil Senates," had to adjudicate more than 2000 revaluation claims. Surrendering the development of the law in a matter of national economy to lower courts would render things even worse. Revaluation really means revamping the financial structure of the country. Courts, whose function it is to decide individual controversies of limited character, have neither the data, the training, nor the facilities to cope adequately with a situation, which includes, besides its judicial aspects, so many relations to currency, taxation, banking, farming, urban real property, etc. It is for legislatures to make the final allotment among the various interests involved.

There is also the problem of timing. As long as inflation moves ahead, constantly tossing the economic system around, one lacks the proper frame of reference for revaluation. The *Reichsgericht* handed down its famous judgment five days after the issuance of the Rentenmark. It was truly favored by good luck. On the day of the judgment the soil still trembled ready to open again [69] as at the time when the *assignats* of the French Revolution were replaced by the *mandats territoriaux*. Happily, the Rentenmark experiment succeeded. What had occurred to the German revaluation in the opposite case is difficult to say. The Hooge Raad, highest court of the Netherlands, and a tribunal inferior to no other, has in a monetary case stated the principle in these forceful words:[70] "The will of the legislature being the law of the parties,

entwertung, Rechtsprechung und Gesetzgebung (1924). He did not succeed in influencing the course of the court. A careful survey (by Keuder) of the pertinent Central European literature in Jastrow, *op. cit.*, at 157. Judicial revaluation has recently been advocated by Rashba, "Debts in collapsed currencies," 54 Yale L.J. 1 (1945), see next note.

68. All this applies especially to the article by Rashba, *supra*, n. 67, where the most diverse legal situations are intermixed and to Hubrecht's study, *supra*, p. 171, n. 1.

69. As the *Reichsgericht* admitted by its holdings on the interest rate of the deflation period, *supra*, p. 165.

70. Judgment of Jan. 2, 1931, *Nederlandsche Jurisprudentie* 1931, 274.

the court has no power, on the strength of its own opinion as to equity and good faith, to discard and to supersede the rule which the legislature, considering all interests involved, has ordained as the fairest and the most just one."

The objections to judicial revaluation apply with particular strength to common law. There is nothing in the English tradition which would warrant such an intrusion of the judiciary into what is properly a legislative field; all indications are to the contrary.[71] In this country a distinguished judge of the preconstitutional era, Chief Justice Kean of Pennsylvania, already saw the light when in a monetary case he made this remarkable statement:[72] "The maxim is certainly just that it is better the law should be determinate and fixed, although it were originally erroneous, than that it should be precarious and fluctuating, according to the different talents and dispositions of the judges who are appointed to administer it." Yet modern American authors have suggested that under the Constitution the Due-Process clause may in an extreme depreciation be successfully invoked against legal tender laws by injured dollar creditors.[73] However, the legal tender laws must not be blamed for possible depreciation. Contrary to what the authors say, the legal tender acts must be defended by the courts in an inflation because everything would collapse if there were no money which the creditors must accept. Actually, in the Legal Tender Cases [74] the court shrank from utilizing the Due-Process clause.

V. Excursus on Savigny's "Current Value" Doctrine

Continental authors writing on debts and on revaluation frequently refer to Savigny's "current value" doctrine. For this reason a brief analysis of that doctrine may be appropriate.

Savigny's discussion of monetary subjects in the first volume of his *Obligationenrecht* (1851) is not very fortunate. In the preface to the volume, written in his 73rd year, the great jurist confesses to a lack of entire familiarity with monetary subjects. In fact, only the unusual authority resulting from his achieve-

71. Accord: Mann, *The Legal Aspect of Money* (1938) 85. It may be mentioned that the Massachusetts General Assembly, under the Act of 1747, Mass. Laws 1747, c. 1, at once set aside a finding of the Judges of the Supreme Court on the depreciation, in terms of silver, of the new-tenor notes. Fisher, *supra*, n. 61, at 424.

72. *Hollingsworth* v. *Ogle*, 1 Dall. (U.S.) 257, 1 L.Ed. 126 (1788).

73. Dawson and Cooper, "The Inflation in the North, 1862–1879," 33 Mich.L.Rev. 852, 902 (1935).

74. 12 Wall. (79 U.S.) 457, 551, 20 L.Ed. 287, *supra*, sec. 42 II.

ments in other fields of law explains his lasting influence in monetary discussion.

Savigny's general analysis of money and debts has already been touched upon. In addition he was concerned with the treatment of debts affected by a depreciation of money. In this respect Savigny points out that money depends for its common acceptance —generator of its "general financial power"—upon the recognition of its value by the community. The proposition is unassailable but he draws from it the conclusion that pecuniary obligations are to be taken in terms of the "current value" at the time of contracting. "Current value" of pecuniary obligations, according to Savigny, is neither nominal nor intrinsic (metal) value nor yet value in terms of purchasing power; it is the commercial value, measured in terms of the standard (then usually silver) of the currency involved.[75]

Accepting this idea, one would expect Savigny to conclude that should money depreciate the courts must disregard the nominal value, and award the creditor a sum sufficient to secure a lender, for example, the "current value" his money had when he lent it. This is indeed Savigny's opinion; however, he makes a crucial exception for the case of a *Zwangskurs* by which, as his examples indicate, he means the legal tender rule applied to depreciated money. In a *Zwangskurs* situation, he declares, the courts must employ the nominalistic rule "even though the Court may deem it reprehensible, harsh, and unjust".[76]

This exception which appears to have been overlooked by some later writers destroys the value of his rule for practical purposes. Indeed, Savigny cannot be invoked in support of judicial revaluation because of the invariable opposition of the latter to legal tender rules.

But Savigny makes the point that the law may confer a nominal value upon a kind of money without rendering it legal tender. In such a situation his current-value doctrine apparently would come into play. But when and where have those situations occurred?

Savigny's main example is taken from the history of the Prussian "groschens" (gross coins), a subsidiary money of copper and silver which circulated in Prussia during the last decades of the 18th century. The groschens were originally rated as a twenty-fourth of the (silver) thaler, then the Prussian money unit. After the unsuccessful war of 1806 against Napoleon, the groschen depreciated, and in 1811 was devalued, to four-sevenths

75. *Op. cit.* at 433. 76. *Op. cit.* 445.

of its original value. Savigny takes the case of a loan of 400 thalers made in groschens which at the original ratio numbered 9600.[77] He holds that after depreciation the debtor must pay either 400 thalers or such number of groschens as at the original ratio would have amounted to 700 thalers. The reason for that conclusion is that the "current value" of the groschens had diminished to that extent. The result would evidently be the same under a nominalistic theory since the groschens, through the devaluation, were given a lower nominal value in thalers. Savigny's example thus reveals nothing. Even assuming that there had been only a depreciation without devaluation (and Savigny places the entire emphasis upon depreciation) it would be unenlightening. The contract called for thalers. The creditor was, therefore, entitled to silver money and was under no duty to accept groschens which, according to Savigny, were not legal tender.

Consequently, the current-value theory has no application to Savigny's example. Nor is it applicable to depreciated money with a nominal value in the discharge of public obligations (public receivability), another situation apparently regarded by Savigny as coming under his theory;[78] there, too, the creditor is not obligated to receive the money.

Savigny cites a Prussian decree of 1808 regarding loans made in depreciated groschens which provided that the current value (*"Kurs"*) at the time of lending should be taken into account in determining how many groschens should be repaid.[79] A closer study of the decree reveals that it envisages groschen loans made *with reference to thalers*. Such reference was interpreted by the decree as an indication of value in terms of thalers. The significance of the decree, therefore, shrinks to a legislative interpretation of a local usage, developed under a dual currency and involving an express reference to silver. If Savigny's discourse is to be read in the light of the Prussian decree, it forgoes any relevance for a general theory of debts.

Moreover, the decree does not plainly and simply use the "current-value" concept. It presupposes, as a condition of that use, a groschen depreciation of more than 10 per cent and it conclu-

77. *Op. cit.* 456, 416.

78. *Op. cit.* 424, note a, referred to at 445, mentions the Prussian *Kassenanweisungen* and the Prussian *Tresorscheine* which had only public receivability (the latter had been legal tender up to 1813). See Savigny, *op. cit.* 498; Sobernheim, "Die Geldentwertung, etc." *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* XLV (1923) 308.

79. *Op. cit.* 494. The decree is found in *Sammlung der für die Preussischen Staaten erschienenen Gesetze und Verordnungen 1806–1810*, p. 304.

sively prescribes the employ of half-month averages of certain local quotations indicated in the decree—qualifications not mentioned by Savigny. In fact, the decree is but another instance of a scaling law. Scales may, of course, be elaborated by the legislature on the basis of "current value". But the legislature may choose to take the intrinsic value or the purchasing power (as was done in the case of the *assignats*) or the rate of foreign exchange as a gauge for scaling. There is no reason why the current value should alone be recognized. If Savigny's *allgemeine Vermögensmacht* is to be the frame of reference, emphasis should be laid on purchasing power rather than on "current value." This holds good whether current-value be used as a principle of legislative or of judicial policy.[80]

Savigny it appears was by no means the initiator of an antinominalistic doctrine. He requires obedience to the *Zwangskurs*; and in the absence of a *Zwangskurs* he suggests the restoration of depreciated debts at their value at *the time of contracting*, a principle known since medieval times. His emphasis on "current value" is original, but remains without results. His doctrine itself has been rejected by Courts [81] and by discerning authors.[82]

80. The current-value theory had first been suggested by Hufeland as a solution of the Bavarian-Tyrolean monetary imbroglio, *supra*, p. 145, which was characterized by the establishment of a new sovereignty, absence of a recasting rule, and depreciation of the existing unit—very much a singular situation. Savigny also refers to a loan made in depreciated Austrian paper money prior to the devaluation of 1811 (*op. cit.* at 438), but, as in the example of the "groschens," he leaves the devaluation enactments out of the picture. There is no evidence that the Austrian courts resorted to a current-value doctrine.

81. Swiss Federal Tribunal, June 3, 1925, *Amtliche Sammlung* 51 II 303, 3071, *J.D.Int.* 1926, 1118, 1120; Roumanian-German Mixed Arbitral Tribunal, *Recueil des Décisions des Tribunaux Arbitraux Mixtes* VII 738, 740 (1927). The Tribunal calls Savigny's doctrine "universally rejected".

82. Thus by Hartmann, *supra*, p. 1, n. 1, at 67; Knies, *Das Geld* (2d ed., 1885) 396; Helfferich, *Geld* (1923) 360 (omitted in the English translation by Infield).

Section 15

OCCURRENCE AND TYPES OF GOLD (AND SILVER) CLAUSES

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I. Gold Clauses and Silver Clauses—The Facts [1]

For good reasons, as was seen, creditors have never felt free from the threat of monetary changes. As far back as the latter part of the Middle Ages, when monetary economy began to develop, creditors protected themselves against losses from such changes by appropriate contractual provisions.[2] Taeuber [3] cites

1. For comparative discussions see Schoo, *La Clausula Oro y el Derecho Comparado* (Buenos Aires 1934); Neumeyer, *Internationales Verwaltungsrecht* III part 2 III (1930) 337; Nussbaum, *Vertraglicher Schutz gegen Schwankungen des Geldwertes* (1928); Domke, *La Clause "Dollar-or"* (2d ed., 1935, Paris); Midas, *Die Goldklausel im Währungsverfall* (1924); Ulrich, *Die Goldklausel* (Aarau, Switzerland, no date); Libourel, *Het Vraagstuk der Goud-Clausule in Nederland* (1932); John Gabriels, *Goud-Clausules* (Rotterdam, 1936); Wortley, "The gold clause," *British Yearbook of International Law* 1936, 112; Sauser-Hall, "La clause-or dans les contrats publics et privés," *Rec. Ac.* LX (1937), 595; Nussbaum, "La clause-or dans les contrats internationaux," *ibid.*, XLIII (1933) 559; Domke, "La clause valeur-or dans la jurisprudence récente," *Nouvelle Revue de Droit International Privé* 1935, 29. Special literature on the national gold clause laws is referred to *infra*, p. 283, n. 17 (American); p. 262, n. 1 (French); p. 254, n. 33 (German). The international aspects of the gold clause are dealt with *infra*, secs. 29 and 30.

2. Helfferich, "Die geschichtliche Entwickelung der Münzsysteme" in *Jahrbücher für Nationaloekonomie und Statistik* XLIV (1895) 801, 808, points out that in Northern Germany, in the middle of the 18th century, pure and simple debts were still "something new". This is probably true for long-time debts. An English protective clause of the latter half of the fifteenth century is presented in Y.B. 9 Edward IV, 49 [Hil. T. pl. 61] (1470). A loan was given in 2 Ed. IV (1462/3) of 40 pounds sterling in groates and nobles, nobles being a gold coin. The debtor obligated himself to pay back the said £40 in the same metal at the value they had when received. Uncommon, though significant, is a case decided in 1300 by the Fair Court of St. Ives. (1 Selden Society, *Select Cases in the Law Merchant* 80). The buyer paid the purchase price in crockards and pollards, inferior coin. When the seller objected, the buyer promised

3. See note 3 on next page.

the following protective provisions in French contracts of the first half of the 16th century: *"25 scuta solis* [4] *boni auri et justi ponderis;" "25 scuta solis auri et in auro;" "50 librae* [5] *in 25 scutis auri;" "25 scuta solis solvenda in eadem specie;" "25 scuta solis solvenda in pecunia eiusdem bonitatis et qualitatis".* Some times the monetary provisions were even more specific. While the protective clauses of early times were ordinarily articulated in terms of special coins of gold or silver,[6] under a developed monetary system they call for the payment of a definite amount of the basic unit, with the *caveat,* however, that only gold or silver coins of the system or either of them should be used in payments,—a stipulation excluding paper money and minor coins. Pure silver clauses are rare; in this country they appeared sometimes after the California gold rush.[7] Alternative

to exchange the coin for good ones if the seller should have difficulties in disposing of the former. Shortly afterward the coins were lowered in value. (*Statutum de falso monetâ,* 27 Edw. I (1299)). The buyer was held liable for full compensation. See also as to "blanc-money" clauses, Hale, *The History of the Pleas of the Crown* (1736) 207.

3. In *"Molinaeus' Geldschuldlehre"* (1928) 48.

4. French: *"écu au soleil"*, the most important French gold coin. [The names *scutum* and *scutus* were used interchangeably.]

5. On the *libra*, see *supra*, p. 38.

6. A protective clause resembling the ancient type appears in the lease of 1791 adjudicated in *Butler* v. *Horwitz,* 7 Wall. (74 U.S.) 258, 19 L.Ed. 149 (1868). The stipulation was for an "annual rent of fifteen pounds current money of Maryland, payable in English golden guineas weighing five pennyweights and six grains, at thirty-five shillings each —and other gold and silver at their present weights and rates established by Act of Assembly".

As a matter of fact the protective clauses of the "pre-system" period frequently became still more involved in trying not only to protect the creditor against the disadvantageous effects of debasement and other deterioration of coin, but also against disadvantageous "raising." The multitude of objectives easily led to obscure and inconsistent stipulations. A considerable part of the activities of contemporary jurists was devoted to the drafting and interpretation of monetary clauses and to the remedying of the mistakes and frauds connected with them. *Supra,* p. 118 n. 14. Some instances of controversial clauses are listed in Taeuber, *Geld und Kredit im Mittelalter* (1933) 290, n. 864.

7. In *Holyoke Water Power Co.* v. *American Writing Paper Co., Inc.,* 68 F.2d 261 (C.C.A. 1st, 1933), the contract, which had been drafted in 1859, provided for a yearly rent of 200 ounces troy weight of silver of the 1859 standard of American coinage or its equivalent in gold, the quantity of gold thus depending on a silver value. The Court remarked that, owing to the discovery and mining of gold in 1849 and in the fifties, silver was the more stable metal, and that contracts frequently were written in terms of silver. See *infra,* n. 43. Cf. also silver clauses passed on in *Mather* v. *Kinike,* 51 Pa. 425 (1866) [ground rent of 1773] and

gold-silver clauses are found more frequently. In *Dalloz Périodique*—the famous French reporter system—one reads that the clause *en or ou en argent et non autrement* appears "in almost every notarial contract." [8] In the United States, until the sixties, the requirement of payment "in specie" was very frequent [9] and in various European countries the phrase *"en espèces sonnantes," "in klingender Münze"* (in tingling coin) was popular with draftsmen.[10] However, it was the gold clause which had by far the greatest expansion. By this clause the debtor promises to pay a *sum of money,* gold coin or equivalent.[11] It is found chiefly in long term contracts, such as mortgage deeds, life insurance policies, and loan bonds,[12] internal and international. In times of monetary troubles, the gold clause makes an appearance even in bills of exchange and other short-term evi-

Christ Church Hospital v. *Fuechsel,* 54 Pa. 71 (1867) [ground rent of 1794]. Touching the validity of the clauses under the Joint Resolution of 1933, see *infra,* p. 296.

The most important silver clause case was decided by the Austrian Supreme Court in the matter of the 1873 and 1874 bonds of the Austrian State Railways Corporation *(Staats-Eisenbahn-Gesellschaft).* The creditors were entitled to receive Austrian crowns or French francs at their then parity, crowns to be payable in "real silver coin." In 1930 the clause was held good, giving the creditors a yield higher than the stipulated franc amount, because of the depreciation of the franc, judgment of Dec. 17, 1930, *Die Rechtsprechung* 1931, 1. Silver clauses were also dealt with by Ital. Cass., April 18, 1932, *Foro Italiano* 1933 I 193. They seem to have occurred more frequently in Dutch mortgage deeds. Libourel, *supra,* n. 1, at 37.

8. *D.P.* 1872 II 51, note.

9. See *Trebilcock* v. *Wilson,* 12 Wall. (79 U.S.) 687, 20 L.Ed. 460 (1871), and particularly *In re Missouri Pac. R. Co.,* 7 F.Supp. 1 at 3 (E.D. Mo., 1934), where a short history of the clause is given, See *supra,* p. 22, n. 89.

10. The clause is expressly mentioned in the Austrian Civil Code 986. See also App. Venice, July 15, 1937, *Foro delle Venezie,* 1937, 763.

11. The same concept underlies the definitions of gold clauses set out in the Dutch, Canadian, and Manitoba Gold Clause Acts and the American Joint Resolution of June 5, 1933 which, however, does not employ the term "gold clause". See *infra,* p. 282, n. 6. The statutes differ somewhat in drawing the boundary line.

12. In France, too, sometimes in long-time rural lease contracts, see Rivière, *Revue de Droit International Privé,* 1932, 1. For an instance, see *Cass.,* Nov. 27, 1933, *D. H.* 1933, 585. The same seems to be true in Holland and Belgium, the Gold Clause Acts of which (*infra,* p. 281, n. 5) expressly provide for abrogation of gold clauses contained in leases. And during the English parliamentary debates in 1811 on the report of the Bullion Committee, it was mentioned that in Ireland many of the leases provided for payment of gold. 19 Hansard, *Parliamentary Debates* 977 (speech of Mr. Huskisson). Cf. also *Palgrave's Dictionary of Political Economy,* II (1925), "Irish currency".

dences of indebtedness.[13] With occasional exceptions, the clause covers both principal and interest.[14]

There is certainly no country in which the gold clause has been more widely used than in the United States. Before 1933 gold obligations in this country totalled probably more than one hundred billion dollars (nominal amount).[15] The insertion of gold clauses in bonds and mortgages was a matter of routine.

13. Before World War I there was frequent use of "gold francs" in the Balkans and in the Near East, and of "gold lire" in foreign trade with Italy. Midas, *Die Goldklausel im Währungsverfall* (1924) 18. After the war the employment of gold units became common in Germany and other inflation-stricken countries, *infra*, p. 235. Bills of exchange and checks were allowed to be articulated in terms of gold marks by a German decree of Feb. 6, 1924, *R.G.Bl.* 1924 I 50.

14. In *Woodruff* v. *State of Mississippi*, 162 U.S. 291, 16 S.Ct. 820, 40 L.Ed. 973 (1895), the Levee Board S.C. of Mississippi had in 1872 issued bonds payable "in gold coin of the United States", the coupons, however, being payable "in currency of the United States". The explanation lies probably in the fact that the board anticipated the rise of the dollar to parity before the bonds would have matured. In the *Rosario* and *San Paolo* cases, *infra*, p. 236, n. 1, p. 237, n. 2, a gold clause was promised solely for interest, although the Court extended it to principal. The Swiss Federal Tribunal, Feb. 11, 1931, *Amtliche Sammlung*, 57 II 69, *J.D. Int.* 1931, 510, 518, was mistaken in declaring that a gold clause limited to interest constituted an "anomaly and an absurdity".

The Court of Appeal in *British and French Trust Corp., Ltd.* v. *New Brunswick Ry. Co.*, [1937] 4 All. E.R. 516 at 537 (C.A., 1937), extended for good reasons the gold clause of a bond to coupons which did not in terms contain the clause, but the House of Lords held to the contrary. [1939] A.C. 1 (1938). Generally, a gold clause contained in the text of the bond itself should be deemed to cover the interest coupons even where the latter do not repeat the clause. Thus held by the Permanent Court of International Justice in the Brazilian Loan case, *J.D. Int.* 1929, 1017, 1021.

15. *New York Herald-Tribune*, April 13, 1933, section 2, at 8 col. 1 gives these approximate figures of gold obligations in the United States: 27 billion dollars, U.S.A. Security Bonds; 16 billion dollars, state and municipal bonds; 12 billion dollars, foreign dollar bonds; more than 50 million dollars, corporation bonds and real estate mortgages. Another estimate totals $123,869,023.89, Hanna, "Currency Control and Private Property", 33 Col.L.R. 617, 633, n. 20. In *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240, 313, 55 S.Ct. 407, 79 L.Ed. 885 (1935), a Gold Clause case, the court figured the total of gold obligations at 75 billion dollars or more.

The Federal District Court of Missouri in *In re Missouri Pac. R. Co.*, 7 F.Supp. 1, 3 (1934), characterized the customary American gold clause as "a sonorous and mouth-filling phrase" which "adds a dignity and a glamour of richness to all bonds, particularly to those which the maker had not and never had the remotest intention of ever paying in anything."

For loans of the United States they were prescribed by law.[16] Memories of the Continentals, the State bank notes, and the greenbacks contributed to this result; but perhaps the most effective cause was the silver agitation.[17] In Germany it was doubtless the bimetallistic endeavors of powerful agrarian parties which before World War I caused the gold clause to pervade the whole field of mortgages, rural and urban. After World War I something like a "gold-clause rush" developed, a psychological compensation as it were for the lack of real gold. In France the spectre of the *assignats* and the suspension of redeemability of banknotes, from 1848 to 1850,[18] were mainly responsible for the spread of gold and specie clauses, while France's financial influence, so powerful prior to World War I, probably accounts for the introduction of gold clauses into the practice of Latin-American countries. In Argentina gold clauses evolved early in the Nineteenth Century.[19] They took on peculiar forms owing to dual accounting in "paper pesos" and "gold pesos." Foreign financing furthermore explains the appearance in Argentina of alternative clauses giving the creditor the right to receive, in his choice, either gold pesos or their equivalent in a foreign draft, ordinarily on Paris.[20] In other countries the gold clauses were likewise well known.[21]

In international relations the use of gold clauses has been and still is considerable.[22]

Gold clauses are not, however, a universal phenomenon. England, despite the suspension of the Bank Act during and after

16. Act of Feb. 4, 1910, 36 Stat. 192, 31 U.S.C. 768.

17. *Infra*, sec. 43 I.

18. Decree of March 15, 1848, repealed by law of August 6, 1850, *D.P.* 1848 IV 49, 50 and 1850 IV 183.

19. Schoo, *supra*, n. 1 at 361. See also *supra*, p. 197, *infra*, p. 247.

20. After World War I several of the Argentinian provinces which had issued bonds under such an alternative clause, tendered depreciated francs to the holder on the theory that owing to the closure of the *Caja de Conversión* (*supra*, p. 130) the "gold peso" alternative had become inapplicable. This defense was overruled by the Supreme Court of Argentina in a number of decisions, the leading of which is *Luchenitti* v. *Province of Mendoza*, Sept. 17, 1923, *Fallos de la Suprema Corte Nacional*, CXXXVIII 402. The debtors had to pay "gold pesos", *viz.*, 2.27 paper pesos for each "gold peso" promised, but this was not the full gold value in view of the growing depreciation of the paper peso. See *supra*, p. 197, and Schoo, *supra*, n. 1, at 365.

21. Gold clauses were customary in Denmark and familiar in other Scandinavian countries. Ussing in *Z.A.I.P.* 1933, 958. On the Swedish "gold-crown" clause, *infra*, p. 246, n. 35.

22. *Infra*, sec. 30 IV.

the French wars, remained aloof from them. It was an article of English commercial faith that the pound sterling was as good as gold; the addition of a gold clause to the sterling obligation was regarded as an impairment of the national currency.[23] It is significant that in the peace treaties ending World War I, England was the only victorious power which forebore to require a gold clause in the reparations provisions[24]—pounds sterling were demanded and nothing more. It was only after World War I that a solitary gold sterling clause made its appearance in English international financing.[25] In Switzerland also, domestic gold clauses seem to have been practically absent[26] and in the Netherlands they were of little significance.[27]

Judicial or legislative maintenance of gold clauses during and after depreciation is wholly different from revaluation. The

23. See *supra*, p. 177 (Resolution Vansittart). This, however, does not refer to early English conditions. Actions for specific coins could be brought in *detinue*, while their sterling value was to be sought in *debt*. *Pope* v. *St. Leiger*, Holt K.B. 550, 90 Eng. Rep. 1203 (1694); *Draper* v. *Rastal*, Cro.Jac. 88, 79 Eng.Rep. 75 (1605).

24. Treaty of Versailles, Art. 262; Treaty of St. Germain, Art. 214. Consequently, among the nine parts of the German Government International Loan of 1930 ("Young Loan"), the English part was the only one which did not contain a gold clause. Another remarkable fact is that in South Africa before World War I protective clauses ordinarily called for payment of "good current British money" or of "British Sterling money," with no mention of gold. *Loxton* v. *McCrae*, 1 South African L.T. 56 (1932). When the pound sterling depreciated, the "sterling" clause was set aside in *Fisher, Simmons & Rodney (Pty.), Ltd.* v. *Munesari*, 53 Natal L.R. 77 (Durban Local Div., 1932).

25. Namely in *Feist* v. *Société Intercommunale Belge d'Electricité*, [1934] A.C. 161 (H. of L., 1933) (*infra*, p. 274, n. 64). The situation in the English dominions is different. Thus in mortgage transactions gold clauses were apparently used in the formerly German sections of New Guinea, *Jolley* v. *Mainka*, 49 C.L.R. 242 at 243 (High Court of Australia, 1933). This was attributable to German tradition. Canada, here as elsewhere, seems to lean toward the American model rather than toward the English; *infra*, n. 38.

26. The Swiss National Bank, in 1929, objected to using the gold clause in domestic Swiss transactions. And such use seems not to have existed previously. See Henggeler, "Die Abwertung des Schweizerfrankens", *Zeitschrift für Schweizerisches Recht* 1937, 158a at 197a. Swiss insurance companies were not allowed to engage in gold clauses. Guhl, *Das Schweizerische Obligationenrecht* (3d ed., 1944) 71. See also *infra*, n. 30.

27. See Engelberts-Visserling-Libourel, *Inflatie en Goud-Clausule in Nederland* (1922) and Libourel, *Het Vraagstuk der Goud-Clausule in Nederland* (1932) *passim*. Both of these were valuable contributions to their subject matter and dissuaded from the introduction of gold clauses into Dutch practice. A special situation seems to have existed as to leases, *supra*, n. 12.

difference is not merely that a gold clause, unlike revaluation, presupposes a specific agreement by the parties, but also that instead of being a restoration of an impaired debt, the gold clause safeguards the debt against impairment by depreciation. The aim of the gold clause is to maintain the full gold value of the debt whereas revaluation seeks the equitable apportionment between the parties of the loss caused by depreciation. Although these would appear to be obvious differences, gold clauses and revaluation are sometimes commingled in legal discussion.[28]

II. Gold Coin Clauses and Gold Value Clauses

The typical gold clause consists of a promise by a money debtor that the sum promised will be paid in gold coins. On the continent it has been customary to add to the nominal expression ("1000 francs", "1000 lire") a brief phrase such as "in gold", "in gold coin",[29] or merely to express the sum to be paid as 1000 *"francs-or"* (gold francs). In the United States a more elaborate clause was almost universally employed; it read: "to pay . . . dollars in gold coin of the United States of [here was frequently added: "or equal to"] the standard of weight and fineness existing on . . ." [the date of contracting follows]. This formula spread beyond the frontiers of the United States.[30]

On the other hand the clause may merely purport to require payment, in currency, of an amount equal to the value of a quantity of gold coins. This clause is rarely found in explicit form, *e. g.*, "payment of the value of 1000 gold dollars." [31] In earlier

28. Thus by Hubrecht, *Stabilization du Franc et Valorization des Créances* (1928) 447, 449.

29. The German-Swiss Gold-Mortgage Treaty of 1920, *R.G.Bl.*, 1920, 2023 lists the following formulae: *in Gold; in deutschem Gold; in deutschem Reichsgoldgelde; in deutschen Reichsgoldmünzen; in deutschen Goldmünzen; in deutscher Goldwährung; in Reichsgoldwährung; in klingender Münze; in klingendem Gelde.* (As to the two last mentioned phrases, see *supra*, n. 10). Besides these, in *Reichsgericht* March 24, 1922, *R.G.Z.* 104, 218 the formula *in jetziger Reichsgoldmünze* is mentioned.

30. It appears, e.g., in *Feist* v. *Société Intercommunale Belge d'Electricité*, *supra*, n. 28; in *New Brunswick Ry. Co.* v. *British and French Trust Corp., Ltd.* [1939] A.C. 1 (H. of L., 1938); in *Reichsgericht*, April 27, 1936, *Bank-Archiv* XXXV (1936) 442; and in Swedish Appellate Court, April 16, 1935, *Re Skandia Insurance Cie, Ltd.* v. *Swedish National Debt Office*, in Plesch, *The Gold Clause* II (1936) 66. Some Swiss examples are cited by Henggeler, "Abwertung des Schweizerfrankens," *Zeitschrift für Schweizerisches Recht* 1937, 216a, n. 19.

31. The only American instance on record seems to be *Levy* v. *Asbestos, Ltd.*, 153 Misc. 125, 273 N.Y.S. 911 (1934) [promise by a mortgagor to "pay the difference between the

American practice, however, alternative provisions of the following types were sometimes used: "in gold or its equivalent;" [32] "in gold coin . . . and if said principal . . . is not paid in gold coin . . . then I promise . . . to pay in addition thereto and as damages such further amount and percentage as may be equal to the difference in value . . . between such gold coin and paper evidence of indebtedness of the States or of the United States, that are or may hereafter be made a legal tender in payment of debts by the laws of this state or the United States"; [33] "in gold or if paid in paper, the amount thereof necessary to purchase the gold at the place of payment". Much more important [34] are implied promises to pay the value of a certain quantity of gold coin.[35]

Promises to pay in gold coin are spoken of as "gold-coin clauses" [*clause espèces-or; Goldmünzklausel; clausola corso oro*], promises to pay the value of gold coin as "gold-value clauses" [*clause valeur-or; Goldwert-Klausel; clausola valore-oro*]. This terminology, continental in origin,[36] has been adopted by the Supreme Court of the United States.[37] The distinction is made with particular clarity, although in different terms, by the Joint Resolution of June 5, 1933, abrogating the gold clauses,[38] and it has become of great importance in judicial interpretation.[39]

proper value of the mortgage or increase the mortgage to its value in gold measured in paper dollars."] A promise by the mortgagor to pay, in silver or notes, an amount "on the rate of gold coin" sometimes appeared in Dutch deeds. Libourel, *supra*, n. 27, at 36.

32. *Reese* v. *Stearns*, 29 Cal. 273 (1865); *Mitchell* v. *Henderson*, 63 N.C. 643 (1869); *Killough* v. *Alford*, 32 Tex. 458 (1870); *Dunn* v. *Barnes*, 73 N.C. 273 (1875); *Church* v. *Howard*, 17 Hun (N.Y.) 5 (1879); *Wright* v. *Morgan*, 37 S.W. 627 (Tex.Civ.App., 1896). Similarly, *Jolley* v. *Mainka*, 49 C.L.R. 242 (High Court of Australia, 1933) ["payable in gold or in currency equivalent thereto"]. See also Act of March 18, 1869, 16 Stat. 1, 31 U.S.C. 731, providing for payment in "coin or its equivalent."

33. *Lane* v. *Gluckauf*, 28 Cal. 289 (1865).

34. *Brown* v. *Welch*, 26 Ind. 116 (1866).

35. *Infra*, p. 248.

36. The writer's, *Das Geld* (1925) 167; Gény, "La validité juridique de la clause 'payable en or'". *Revue Trimestrielle de Droit Civil* 1926, 557, 564; Ascarelli, *La Moneta* (1928) 160; Ussing in *Ugeskrift for Retsvaesen* (Copenhagen) 1933 B 264.

37. *Norman* v. *Baltimore and Ohio R. Co.*, 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935). Its use was suggested by the writer's "Comparative and international aspects of American gold clause abrogation", 44 Yale L.J. 55. (1934).

38. 48 Stat. 112, 31 U.S.C. 463. The Canadian Gold Clause Act of 1937 adheres closely to the American model. *Bull. I.I.I.* XXXVII (1937) 109.

39. The main problem is whether a

A variation of minor importance is that some clauses refer merely to gold coins, while others, *e. g.*, the customary American formula, which speaks of gold coins as of the time of contracting, fix the amount of fine gold to be given in payment. The latter clause protects the creditor against later debasement of the gold coin such as occurred in the United States in 1834.[40] This aim appears quite clearly in such gold coin clauses as the following: "$1000 gold coin *of or equal to* the standard . . ."[41] The words italicized differentiate the clause from the alternative gold value clause which is usually phrased as follows: "$1000 gold coin *or equivalent.*"

III. Gold Bullion Clauses

After inflation an attempt is sometimes made to escape the risks of depreciation by gold clauses requiring payment in gold bullion. In *Holyoke Water Power Co.* v. *American Writing Paper Co.*, the plaintiff had executed in 1894 a number of leases of water power by which the lessee promised to pay as rent "a quantity of gold which shall be equal in amount to $1,500 of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency". This alleged gold bullion clause, however, was held by the Supreme Court of the United States, in a brilliant and forceful opinion by Mr. Justice Cardozo, to constitute a monetary obligation with a gold clause.[42] The court pointed out that what the creditor really wanted and the debtor promised, were dollars.[43] Not even the use of weight measures for fixing the quantity of gold owed[44] would protect the creditor from such a realistic method of interpretation.

gold value clause is implied in a gold coin clause, *infra*, sec. 248.

40. *Infra*, sec. 41 IV.

41. Lord Romer, of the English Court of Appeal erroneously felt the words "or equal to" to be "mere surplusage", [1933] 1 Ch. 684, 708.

42. 300 U.S. 324, 57 S.Ct. 485, 81 L. Ed. 678 (1937). Comment in 15 *North Carolina L.R.* 196 (1937).

43. 300 U.S. 324 at 336, 57 S.Ct. 485, at 488. In the silver-clause case among the same parties, *supra*, n. 7, the opposite theory was applied.

44. As done in *Dewing* v. *Sears*, 11 Wall. (78 U.S.) 379, 20 L.Ed. 189 (1871), reversing 96 Mass. 413 (1867), and in *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 F. 2d 166 (C.C.A.8th, 1938). In the first case the contract called for a payment in four installments of a yearly rent of 4 ounces, 2 pennyweights and 12 grains of pure gold, in coined money. The court ordered the judgment to be rendered in terms of coined dollars, under the theory of *Bronson* v. *Rodes*, *infra*, p. 274, n. 63. In the *Emery Bird* case the contract was for a yearly rental of 557,280 grains of pure unalloyed gold, with an option

In Germany, at the height of inflation, the legislature encouraged the use of sham gold-bullion clauses. By a law of June 23, 1923,[45] permission was given to record mortgage-obligations requiring payment of the value of so many kilograms and grams of fine gold, despite the fact that German mortgage law required the debts secured by the mortgage to be for a sum certain expressed in marks. As a matter of fact the legislative experiment of 1923 was practically abandoned when in 1924 registration of mortgages in terms of "gold marks" was permitted.[46]

A real contract for gold-bullion payment is envisaged by the French Civil Code, Art. 1896, which provides that the nominalistic rule of Art. 1895[47] shall not apply where "the loan is made in bars" (*lingots*). This rule has been adopted by other Codes on the French model[48] but seems to be without practical importance.

IV. Accounting in Gold (or Silver) Units—Mark-Banco

In times of grave monetary troubles, the use of gold clauses may give rise to a general custom of accounting in gold (or silver) value units which are distinct from the actual monetary unit. This phenomenon has a long history.[49] By mercantile custom of the sixteenth and seventeenth centuries, drafts on and from the great Italian fairs were made in terms of *scuti marcharum (scudi di marche)*, the *scutus* representing a definite quantity of fine gold, namely, 1/65th of a *marcha*, a weight equal to about 234 grams.[50] Payment was made in current coin, particularly Venetian and other *scuti aurei*, in a ratio determined not by

in the lessors to demand a quarterly payment of $6000 in lawful money. The decision, criticized in the first edition of this work (p. 309, n. 43), was set aside in 107 F.2d 965 (C.C.A.8th, 1938; same parties).

In the case of Trib. cir. Clermont-Ferrand, Dec. 5, 1938, *J.D.Int.* 1939, 622, the creditor had taken pains to actually buy an ingot of gold and to "lend it to the debtor for consummation" on interest. The ruse did not help him. The court discovered in the transaction a disguised gold clause which was held invalid. A gold bullion clause also appears in App. Lyons, Oct. 31, 1938, *Nouvelle Revue de Droit International Privé* 1939, 190.

45. *R.G.Bl.* 1923, I 407.

46. Decree of April 17, 1924, *R.G.Bl.* 1924 I 414.

47. *Supra*, p. 174, n. 9.

48. Italian Civil Code of 1865 Art. 1823 (not adopted by the 1942 Code); Spanish Civil Code 1754(2); Dutch Civil Code 1795.

49. L. Goldschmidt, *Handbuch des Handelsrechts* I (1868) 1183, n. 16; *id.*, *Universalgeschichte des Handelsrechts* (1891) 312, n. 53; Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre* I (1874) 182.

50. L. Goldschmidt, *Handbuch des Handelsrechts* I 1083. The Italian *marcha* was of German origin.

governmental fiat but by mercantile agencies. Similar usages existed in other countries.[51]

This scheme was considerably improved when in 1770 the *Hamburger Girobank* (1617–1873), adopting an earlier Dutch device,[52] created the *mark-banco*.[53] A person depositing silver with the bank was credited in *marks-banco*, one *mark-banco* being equivalent to about 8.43 grams of silver. The bank thus became obligated in terms of a weight unit which was independent of the multiplicity and the irregularities of the circulating monetary media of payment. The silver, received from the customers, constituted the foundation for the *mark-banco* credits.[54] The

51. In Germany the *pagament* of Cologne was the counterpart of the Italian *scudo di marche*. See von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte* III part 2 (1901) 386. Units of this kind are sometimes called *moneta imaginaria*, but this term should be reserved for the phenomenon discussed *supra*, p. 37.

According to E. Hoyer, "Währungsfragen im Codex Juris Canonici" in *Festgabe für Oscar Englander* (1936) pp. 101, 110, the Roman Curia in the beginning of this century still reckoned in gold *scuti*. Even in 1930, N. Hilling, *Procedure at the Roman Curia*, p. 31, mentioned that the salary of the Cardinals was defined in terms of gold *scuti*. In all probability this unit of account is related to the *scutus marcharum* of old.

52. *The Amsterdamsche Wisselbank* founded in 1609 was described by Adam Smith, *Wealth of Nations* (1776) book IV, ch. 3, part 1, digression. See also Van Dillen, *History of the Principal Public Banks* (The Hague, 1934) 79.

53. See Goldschmidt, *Handbuch des Handelsrechts* (1868) 1179 n. 8 *et seq.*; Sombart, *Der Moderne Kapitalismus* (3d ed., 1921) 424; Knapp, *The State Theory of Money* (1924) 145; Ernst Levy von Halle, *Die Hamburger Girobank* (1891); Sieveking, "Die Hamburger Bank", in Van Dillen, *op. cit.* in preceding note, at 125; Jastrow, *Die Prinzipienfragen in den Aufwertungsdebatten* (1937) 44. Data may also be found in *Palgrave's Dictionary of Political Economy* (1926) "Banks" 105.

Strangely there was in modern China a copy of the *mark-banco*, the Newchwang "transfer money", see Morse, "Currency in China", *Journal of the North China Branch of the Royal Asiatic Society*, XXXVIII (1907) 52.

54. The silver was kept by the bank in its vaults at the disposal of its customers. Where title to the silver resided is not clear. A reference to existing legal controversies is found in von Halle, *supra*, n. 53, at 27. Probably the bank was the owner of the silver, subject to a personal obligation to restore to the deliverer of the silver, or to his order, the same quantity received (on the theory of a *depositum irregulare*) and to keep the silver ready at any time for disposal by the customer. Knapp, 146, points out that the silver stored in the vaults of the *Girobank* and employed for creating *mark-banco* accounts was no longer silver as such, but from a legal angle modified like gold by the process of coinage. This is erroneous. Only by coinage, a new thing—a veritable money—comes into existence. The case of

customers were entitled to utilize their accounts by receiving silver from the bank or by directing the bank to deliver silver to third persons. There were no "checks" of the modern type, but, as between customers, ledger transfers. Accounting in terms of *marks-banco* was customary in important business transactions. In everyday life money was employed in the usual way, the monetary unit being the "Hamburg mark" as distinguished from the *mark-banco*.[55]

The *mark-banco* was neither represented by a coin nor by paper money. It was a measure of certain choses in action, viz. of claims against the *Hamburger Girobank* or against persons who had expressly stipulated in terms of *mark-banco*. Though the *mark-banco* was not money proper, it was frequently labeled "bank-money".[56]

The issue of the legal nature of the *mark-banco* was presented early in the seventies when a new German currency was created on a gold basis. Provision was made for conversion into the new Reich currency of existing debts payable in State money (Prussian, Bavarian, and so on).[57] The Reich government refused, however, to fix a statutory ratio between the *mark-banco* and the new mark. In the opinion of the Reich government the *mark-banco* was not money and was therefore not convertible. Conversion of the *mark-banco*, so ran the plausible argument, would in practice mean fixing the price of silver by law, which had never been intended.[58]

the silver in the vaults of the *Girobank* was wholly different.

55. In the American Act of July 31, 1789, "to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, etc." 1 Stat. 29 at 41, § 18, it is provided that among other "coins and currencies", "each *mark Banco* of Hamburgh" shall be estimated at 33⅓ cents. This does not refer to payments to be made in the American port, but to the amounts indicated in the invoices of imported goods.

In the German *Wechselordnung* of 1849, as amended June 3, 1908 (*R.G.Bl.* 1908, 327), Art. 37, the *banco*-unit was referred to as *Rechnungswährung*, which may be approximately translated as "currency of account". The reference has been omitted in the German *Wechselgesetz* of June 21, 1933 (*R.G.Bl.* 1933, I 399), which rests on the Uniform Bill of Exchange Act drafted by the League of Nations in 1931.

56. A terminology employed also by Adam Smith, *supra*, n. 52.

57. Act of Dec. 4, 1871, *R.G.Bl.* 1871, 404, § 8.

58. See Helfferich, *Die Reform des Deutsche Geldwesens*, I (1898), 198; von Halle, *supra*, n. 53, at 43, 53. It is true that Bismarck's motives in opposing Hamburg were by no means purely juridical.

Reviving some features of the *Girobank*, men prominent in Hamburg commerce and finance founded at

Another type of accounting in units of metal value developed after World War I, during the last phases of the German great inflation. The more the Germany monetary unit, the mark, faded, the more people calculated in "gold marks," meaning the value of 1/2790 grams of fine gold, defined by the Coinage Law as a "mark". No gold coins circulated in Germany; payment of gold-mark debts had to be made in currency according to the fluctuating market price of gold. At variance with the Hamburg *mark-banco* the post-war gold mark was not backed by a central bank operating on the basis of the accounting unit and possessing the necessary metal reserves. Banks refused to conduct accounts in gold marks because of the unbearable risks involved. The institutional feature was therefore absent in the situation.

Again, the gold mark could not be spoken of as a "monetary" unit. It was a mere accounting unit invented to secure to the creditor a value independent of the fluctuations of money. Only one monetary unit existed at one time—the "mark", and during and after 1924 the new "reichsmark." [59] The term "paper mark" while sometimes loosely used by courts [60] is never found in statutory language, though the gold mark was adopted and elaborated upon by statute. The latter created several types of gold marks, one based on London gold-market quotations ("fine-gold mark") and another on dollar quotations ("dollar-gold mark").[61] After the stabilization of the German currency detailed regulations were issued for conversion from marks to the dollar-gold mark in commercial accounting.[62]

the height of the inflation the *Hamburgische Bank von 1923*, which, on the basis of an actual dollar reserve, emitted *Verrechnungsanweisungen* (approximately: "clearinghouse certificates"), a number of them in the form of aluminum coins. Actually, this was a local currency, which disappeared with the national stabilization in 1924. Cf. Nussbaum, *Das Geld* (1925) 108. Counterfeiting of the Hamburg notes was punished by the Reichsgericht, Jan. 15, 1925, *Entscheidungen des Reichsgerichts in Strafsachen* LIX 31.

59. Coinage Law of June 1, 1909, *R.G.Bl.* 1909, 507; Coinage Law of Aug. 30, 1924, *ibid.*, 1924 II 254. Lord Sterndale's statement in *Chesterman's Trusts-Mott v. Browning*, [1923] 2 Ch. 466, 478 (C. A.) "there is no such thing as a gold-mark" was accurate.

60. For an American example see *In re Illfelder's Estate*, 136 Misc. 430, 431, 240 N.Y.S. 413, 415 (1930).

61. *Infra*, p. 256, and p. 259, n. 61. On the manifold shadings of German gold clauses see Supreme Court of Bavaria, March 7, 1929, *J.W.* 1929, 3022, and the writer's *Das Geld* (1925), 104.

62. The "Ordinance on Gold Balance Sheets" *(Goldbilanzverordnung)* of Dec. 28, 1923, *R.G.Bl.* 1923 I 1253, was basic. Many supplementary and executive decrees followed. Quassowski, *Goldbilanzverordnung* (1924).

Devices similar to the "gold mark" were used during the same period in Austria ("gold crown"), Hungary ("gold pengo"), Poland ("gold zloty") [63] and the Soviet Union ("gold ruble").[64] There was in the Levant and elsewhere also accounting in "gold francs" [65] but in contrast to the "gold mark", "gold crown" etc., this was not as a domestic device. The non-German accounting units were much less variegated and elaborate than the German "gold mark".

However, the affix "gold" used in connection with a monetary unit does not necessarily indicate a unit based on a gold clause; it may constitute a legally irrelevant reference to a historical relation to gold.[66]

Section 16

ASCERTAINING THE GOLD CLAUSE

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I. Evidentiary Basis of Gold Clauses

A gold clause obligation may be established apart from the instrument containing the promise to pay. When, for instance, in the case of a bonded loan, payment in gold is promised merely in the prospectus preceding or accompanying the subscription and issuance of the loan, it has been repeatedly held that a binding gold clause is created by the subscription which constitutes an acceptance of the promise found in the prospectus.[1] This certainly is sound since the market is ordinarily built up on the prospectus.

Touching the literature on stabilized accounting, see *supra*, p. 174, n. 7.

63. Lengthy statutes providing for the restriction and regulation of "gold-crown" and "gold-pengo" debts were enacted in Austria and Hungary, *infra*, p. 280, n. 5; p. 294.

64. This refers to the period preceding the monetary reforms of 1924. Cf. Bloch, *supra*, p. 216, n. 63, at 251.

65. In a striking parallel to Lord Sterndale's statement, *supra*, n. 59, the Supreme Court of Ontario, in *Derwa* v. *Rio de Janeiro Tramway, Light & Power Co.*, [1928] 4 D.L.R. 542 (1928), said at page 552: "There is in law no such thing as gold franc."

66. This question will be fully discussed *infra*, p. 243.

1. Permanent Court of International Justice, Series A, Nos. 20/21, Judgment No. 14, *J.D.Int.* 1929, 977 at 1018, in the case of the Brazilian loan of 1909; Cass., July 9, 1930, *J.D.Int.* 1931, 124, [loan of the *Société du Port de Rosario*]; Cass., Jan. (Feb.?) 14, 1934, *J.D.Int.* 1934, 1202, [loan of the *Banque Hypothécaire Franco-Argentine*]; Cass., Jan. 20, 1936, *D.H.* 1936, 113, [loan

The French *Cour de Cassation,* has, however, gone further. Before world War I a Brazilian corporation, the *Compagnie de Chemin de Fer de Sao Paolo à Rio Grande,* floated a bonded loan in France. While the stockholders' meeting of the railroad company had authorized a loan in terms of francs, bearing "interest of 5% gold", the bonds and coupons were actually couched in "francs". As is usual, reference was made in the bond to the resolution of the meeting duly published in the Brazilian official journal authorizing the issue. Apparently the directors did not exercise all the powers conferred on them by the resolution of the stockholders; they might well have negotiated more favorable terms. Evidently, an *authorization* of the board does not necessarily amount to a contract binding the corporation. The French *Cour de Cassation,*[2] however, read a gold clause into the general reference to the stockholders' resolution, extending the clause even to the principal.[3] In an action instituted by another bondholder the latter's attorney had apparently not perceived the possibilities offered by the stockholders' resolution, or else had for good reasons considered it irrelevant. Thus he lost the suit.[4]

A reference to gold, not contained in the contract itself, will sometimes be found in documents coming from the prospective *creditor.* In business practice particularly of Germany and Austria after World War I, the seller of goods frequently used invoice forms containing the following recital "price payable in gold marks" or "gold schillings" respectively. The general doctrines of offer-and-acceptance determine under what circumstances such provisions become part of the contract. One-sided

of the *Cie, des Chemins de Fer de Porto Rico,* an American (previously Spanish) corporation]; Swiss Federal Tribunal May 23, 1928, *Amtliche Sammlung* 54 II 257 and *J.D. Int.* 1929, 497, regarding a loan of the *Crédit Foncier Franco-Canadien; Reichsgericht,* Nov. 12, 1934, *J.W.* 1935, 189; Hooge Raad (Supreme Court of the Netherlands), April 28, 1939, *Nederlandsche Jurisprudentie* 1939, 1377, *Sirey* 1939 IV 20 and App. Paris, April 24, 1940, *Revue Critique de Droit International* 1946, 82, both concerning the Canadian loan of the Messageries Maritimes (*Société des Services Contractuels des Messageries Maritimes*); Trib. civ. Seine, March 22, 1939, *Nouvelle Revue de Droit International Privé* 1939, 208 [loan of the *Banque Centrale des Caisses Rurales de Crédit* (Finland)]. In the *Rosario* case the subscription forms, too, contained a reference to gold in these terms: "*Emprunt 5%, 1908 . . . Emission de 80,000 obligations de 500 francs, 5% or . . .*" The Court not only used a prospectus theory but also extended the gold clause which did not appear in the bonds to principal. See, however, *supra,* p. 226, n. 14.

2. Judgments of Jan. 24, 1934, *D.P.* 1934 I 73.

3. At p. 77. See *supra,* p. 226, n. 14.

4. *D.P.* 1934 I 78.

insertion of the recital in an invoice was of course, legally ineffective. An Austrian decree of April 26, 1933,[5] having the force of law, expressly stated that acceptance without protest of such an invoice did not amount to a promise of payment in gold or in gold value. This rule seems to be sound.

II. Implied Gold Clauses

It is not necessary that a gold clause be expressed in terms of gold. For instance, a stipulation for payment "in specie" or in *"klingender Münze"* [6] is a gold clause if, at the time of payment, gold coins (or notes redeemable in gold) are the only unlimited legal tender. Similarly, if under a "limping gold standard" [7] silver coins are likewise unlimited legal tender, the stipulation is tantamount to an alternative gold-silver clause.

In an Italian case a testator made a bequest in lire, the bequest "to be increased or decreased in proportion to the decrease or increase of the lire." This was correctly held to be a gold (-value) clause rather than a reference to the fluctuations of the purchasing power of the lire.[8]

A different attitude was taken by the French *Cour de Cassation* in a case involving foreign holders of a mortgage executed on real property in Alsace-Lorraine while that territory was part of Germany.[9] The clause of the deed read: "Payable in good specie (*bonnes espèces*) of German currency." [10] Since the only

5. *Bundesgesetzblatt* 1933 no. 149.

6. *Supra*, p. 225, n. 10. The term "pound sterling" does not connote a gold clause. *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.*, 10 Lloyds L.R. 703 (H. of L., 1922), though it may mean English pounds rather than colonial pounds. *De Bueger* v. *Ballantine & Co.*, [1938] A.C., 452 (Pr. C.).

In an old Itallan rural lease payment of tithes had been stipulated in terms of silver *"scudi"* or gold. When the silver *scudi* went out of circulation the proviso was construed as a gold clause. Ital. Cass., March 2, 1937, *La Settimana della Cassazione* 1937, 466.

7. *Supra*, p. 125.

8. App. Milan, Dec. 26, 1935, *R.D. Comm.* 1936 II 386 at 403. Similarly, Court Viterbo, Oct. 26, 1935, *Foro Italiano* 1936 I 872 [annuity contract providing for readjustment of the annuities "according to market conditions on the basis of the gold lire"]. Less convincing is Court Torino, May 22, 1934, *R.D. Comm.* 1935 II 531, 569, considering as a gold clause a reference to pound sterling that was combined with a wholesale index, the amount due to be calculated on a middle ground between pound and index. See also App. Brussels, March 9, 1935, *La Belgique Judiciaire* 1935, 339 [rent in francs at a rate of fr. 35= 1 dollar or *"à default du dollar,"* at a rate of 173 fr.= 1£; construed by the Court as a gold value clause].

9. Cass., Jan. 11, 1926, *J.D.Int.* 1926, 441.

10. This is translated from the French translation. The original

unlimited legal tender coins in Germany were gold coins at that time it is clear that this was a gold clause. Still the Court held to the contrary, thereby depriving the clause of any legal relevance.

Attempts to spell out gold clauses from attending circumstances are more significant than the interpretation of "specie" clauses and similar references. In cases of contracts for the payment of a definite sum entered into while money was stable, (*e.g.*, dollars before the Civil War,) it was not surprising that when an unexpected depreciation occurred creditors should urge the courts to interpret the obligation to pay in terms of the gold value at the time of contracting. This type of tacit-gold-clause theory obviously comes very close to revaluation and was rather suggested in *Willard* v. *Tayloe*.[11] It was, however, definitely rejected in *Maryland* v. *Baltimore and O. R. Co.* That case involved a contract, made in 1839, between the State of Maryland and the railroad company, guaranteeing the state a certain return upon its investment in the road. In connection with these transactions the State had contracted a bonded loan in terms of gold. Nevertheless, the Supreme Court held in a forceful opinion by Mr. Justice Strong,[12] that Maryland was merely entitled to receive current dollars since the possible expectation of the creditor and the anticipation of the debtor that payment would be made in coin did not amount to a contractual obligation. This view [13] has been adopted by the courts of almost all countries even where indications of the existence of a gold clause were stronger. Thus a gold clause has not been implied where the debtor gave security in terms of gold [14] or even where the parties to a contract, because

German phrase is not indicated in the reports.

11. 8 Wall. (75 U.S.) 557, 19 L.Ed. 501 (1869) *supra*, p. 188.

12. 22 Wall. (89 U.S.) 105, 22 L.Ed. 713 (1874). Same solution in *Thompson* v. *Riggs*, 5 Wall. (72 U.S.) 663, 18 L.Ed. 704 (1867). A tacit gold clause was recognized in *Spencer* v. *Prindle*, 28 Cal. 276 (1865), a case reflecting the particular conditions prevailing in California, *infra*, sec. 42, at n. 21.

13. It was presented in a particularly impressive way by the Privy Council in *Ottoman Bk. of Nicosia* v. *Chakarian*, [1938] A.C. 260 (Pr. C. 1937); same; *Sforza* v. *Ottoman Bk. of Nicosia*, [1938] A.C. 282 (Pr. C. 1937). See also the cases cited in n. 14 and 15.

14. *Cass.*, Jan. 24, 1934, *D.P.* 1934 I 73 at 77, concerning the loan of the Brazilian *Compagnie de Chemin de Fer de Sao Paolo à Rio Grande* (first case). The Brazilian Government had undertaken a guaranty in terms of kilometers and of gold on behalf of the company. The reference to this guaranty in the prospectus of the loan was held irrelevant by the Court. See, however, *supra*, p. 237. Similarly, *Cass.*, Nov. 5, 1934, *J.D.Int.* 1936, 177 [guarantee of Moroccan loan by gold customs held not to amount to a gold clause], and July 21, 1936,

of the instability of their domestic currency, had stipulated that payment should be in terms of a stable foreign currency. As a matter of fact a person who contracts in terms of a foreign currency subjects his contractual rights and duties to the vicissitudes of that currency. This rule, basic to the legal treatment of foreign-currency obligations, is also decisive in the present situation; where the foreign-currency creditor, for whatever reason, is not safeguarded by an express gold clause, it is not for the courts to supply the omission under the pretext of interpreting the contract.[15]

The issue revealed a peculiar aspect in Germany when after the breakdown of the pound in 1931 and of the dollar in 1933, the reichsmark remained stable. Earlier many German parties had contracted for payment in English pounds or in dollars, in the belief that these currencies would offer complete security against depreciation. When events unexpectedly took the opposite direction the creditors tried to represent their stipulations as "tacit" gold clauses but the German courts rejected the argument [16] with

J.D.Int. 1937, 299, in the case of the *Papeteries de France* (dictum). With regard to the prewar loans of the *Banque Hypothécaire Franco-Argentine* (a French company), a different result was reached since the prospectus besides mentioning the "Argentine gold" mortgages underlying the loan, had added that the bondholders would thereby be protected from the fluctuations of the rate of exchange, *Cass.*, Jan. (Feb. ?) 14, 1934, *J.D.Int.* 1934, 1202. (The case was criticized by Trotabas, *D.P.* 1934 I 74.)

15. See Ital. Cass. Jan. 10, 1936, *R.D. Comm.* 1936 II 386 [the amount of lire to be paid was measured, under the contract, in English pounds, on a ratio which was the gold parity at the time of contracting]; App. Brussels, March 15, 1933, *J.D.Int.* 1933, 722, 724 [*contra*, in the light of particular facts, App. Liége, Feb. 17, 1936, *Pasicrisie Belge* 1937 III 34] and other Belgian courts cited by Piret, *Les Variations Monétaires* (1935) 101, n. 1; App. Vienna, June 11, 1932, J.W. 1932, 3840; arbitral awards in *Hanseatische Rechts- und Gerichtszeitschrift*, 1932 B 234 and 591; 1937 B 98. See also Supreme Court of Austria, May 5, 1932, *Die Rechtsprechung* 1933, 109. The attitude of the Danzig courts after the 1931 collapse of the English pound was different because of the tie-up of the Danzig guilder with the original pound; see cases in *Z.A.I.P.* 1933, 902. A dollar clause in a Czechoslovakian lease was construed as a gold clause by the Supreme Court of Czechoslovakia, Feb. 4, 1938, *Prager Juristische Zeitschrift* 1938, 331. On the tacit-gold-clause in international contracts, *infra*, n. 24.

16. E. g., by App. Hamburg, June 14, 1932, quoted in *Hanseatische Rechts-und Gerichtszeitschrift* 1932 B 593; App. Hamm, Feb. 16, 1933, *J.W.* 1933, 1267. The same principle underlies the Reichsgericht's judgments of June 21, 1933, *R.G.Z.* 141, 212; June 28, 1934, *ibid.*, 145, 51; April 2, 1935, *ibid.*, 147, 286. See also Gruber, *Pfund und Dollar* (1935). The same line of reasoning was resumed by the judgments of May 28, 1937, *R.G.Z.* 155, 133 and

some vacillation.[17]

All in all, decisions in favor of the tacit gold clause are very rare. More recently such a clause was assumed by the Privy Council in a Palestinian case where a loan was contracted in terms of "French lire" (francs). Local quotations for gold and paper francs existed then. Since a debtor had paid his interest on a gold basis the court interpreted this conduct as an admission that the contract was for gold francs.[18]

A special situation prevailed in Egypt. Until 1883 France had been the dominant European power in Egypt. At an early period, the French gold coins were incorporated as "exogenous" elements into the Egyptian monetary system at a definite ratio to the piastre, the Egyptian unit. Egyptian Mixed Tribunals, therefore, asserted that in Egyptian monetary relations the term "franc" had to be interpreted as gold franc. This theory was applied to various franc loans made by Egyptian companies and individuals.[19] The way had been paved for the Egyptian courts by

J.W. 1937, 2823, but the situation became hopelessly confused through the excesses of revaluation and the law of 1936 on foreign devaluation, *infra*, sec. 24 at n. 61.

A special situation was presented in *Reichsgericht*, Oct. 2, 1935, *R.G.Z.* 149, 1, where a dollar-debt, apparently between Germans, was secured by a "gold" mortgage on German real estate. The Court held that through the mortgage deed the debt, too, had been converted into a gold debt. However, in the case of a pound loan of the State of Hamburg, the Reichsgericht rejected the theory of a tacit gold clause although the prospectus had stated the revenues of Hamburg as well as the total of interest in terms of gold. The gold value of the English pound was also referred to in the prospectus. Judgment of Feb. 7, 1938, *J.W.* 1938, 1109. The theory of the 1935 judgment seems to have been abandoned in the decision of March 7, 1938, *infra*, n. 36.

17. Judgment of Dec. 14, 1934, *R.G.Z.* 146, 1 [promise of reichsmarks "on a firm dollar basis" of 10/42 as goldmarks]; of Jan. 2, 1935, *Bank-Archiv* XXXIV (1935) 460 [a tacit gold clause was read into a pound contract on the ground that the parties, in choosing the English currency, had intended to obtain a consideration stable in value *(wertbeständig)*]. See, on the other hand, judgment of June 28, 1934, *R.G.Z.* 145, 51.

18. *Apostolic Throne of St. Jacob* v. *Said*, [1940] 1 All Eng. R. 54.

19. Mixed App. Alexandria, April 7, 1927, *Revue du Droit Bancaire* 1928, 357 [Loan of the *Société Anonyme des Chemins de Fer de la Basse Égypte*]; May 19, 1927, *J.D.Int.* 1928, 765 [mortgage transaction between non-corporate parties]; April 12, 1928, *J.D.Int.* 1928, 777 [loan of *Caisse Hypothécaire d'Égypte*]. Indeed, earlier judgments on somewhat different facts applied a "franc-for-franc" ruling. Mixed App. Alexandria, Nov. 12 and 26, 1924, *J.D.Int.* 1926, 206, 207 [life insurance by the French company *La Foncière*]; March 10, 1926, *Revue du Droit Bancaire* 1927, 368 [life insurance by the German company *Victoria*].

the Appellate Court of Paris. In the case of the *Compagnie Universelle du Canal Maritime de Suez,*[20] a French corporation with its principal domicile in Paris, the franchise—granted to the Compagnie in 1856 by the Egyptian government—provided that rates for passage of the Canal were to be paid in "francs". The Court held that gold francs were meant because of the international character of the Canal. When, however, the holders of franc bonds issued by the company before World War I demanded payment in gold francs, their suit was dismissed by the *Tribunal Civil de la Seine,* although the bonds were worded in several languages and were payable in various countries.[21] The inconsistency of the courts was denounced also by French writers.[22] Still, in this situation the Egyptian courts did not follow French guidance. They applied their "gold franc" doctrine to the bonds of the Suez Company which had a business domicile in Cairo.[23] Thus, the *Compagnie,* because of its vulnerability in Egypt, was finally forced to pay the creditors in gold.

The Egyptian cases, while bordering the international field, pertain basically to internal law. However, tacit gold clauses have been claimed to exist also under international treaties and in other purely international situations.[24]

At present, after all but complete annihilation of private gold clauses,[25] the issue of tacit gold clauses takes on a new aspect. While in former times parties invoked such clauses in order to increase their contract rights, the assertion that a gold clause is

20. Judgment of Feb. 15, 1924, *J.D. Int.* 1924, 688.

21. Judgment of April 1, 1925, *J.D. Int.* 1925, 1023.

22. See Mestre and James, *La Clause-Or* (1926) 106.

23. Mixed App. Alexandria, June 4, 1925, *J.D.Int.* 1925, 1080. See also the same court, June 18, 1931, *J.D. Int.* 1932, 202, 207 [dividends and *interêt statutaire* of the company's stock, payable in gold]. An Egyptian decree of May 2, 1935, *infra,* 281, n. 5, abrogating gold clauses with regard to "international payments," provided that payment was to be made at the face amount in Egyptian money. It was held, somewhat artificially, that the decree did not apply to the "international gold franc," owed by the Suez Company. Mixed App. Alexandria, Feb. 24, 1940, *Gazette des Tribunaux Mixtes* XXX 218. This time the Egyptian courts met with an effective counter-move: by a decree of Jan. 1, 1941, the (British) Military Governor-General authorized the Suez Canal Company to make payment at a franc-piaster gold ratio which practically led to an effect similar to that which the application of the decree would have had. *Bulletin de Législation et de Jurisprudence Égyptien* LIII 9.

24. *Infra,* secs. 27 II and 35 at n. 29.

25. *Infra,* secs. 18 and 19.

present might now be used as a tool for annihilating the agreement.[26]

III. Sham Gold Clauses

While it is entirely within the lines of common legal technique to spell gold clauses from the terms of the contract or from extrinsic circumstances, there is sometimes a surprising failure to give effect to a gold clause though the parties have expressed the sum to be paid in gold. Instances of this can be traced back to the sixteenth century and even to the Middle Ages. Thus, a sixteenth-century French contract for payment of one hundred *ducati auri* could be discharged by other coins, equivalent *in law* to the *ducati*. To escape the application of this rule and secure payment in real gold coin the formula *auri et de auro* was added after the name of the coin.[27] That venerable practice has a modern counterpart in the occasional association—by law or by custom—of the name of a new monetary unit with the word "gold" where the monetary system is reorganized on a gold basis. This happened in Russia when in 1890 the ruble was shifted from a silver to a gold basis. In commercial parlance the new ruble was called "gold ruble." [28] Similarly, the new monetary unit created by the Soviets in 1924 was commonly spoken of as "gold ruble" although that appellation had no other basis than the legal ratio adopted.[29] There are other examples.[30] Evidently refer-

26. In *Fritz* v. *Beem*, 199 Ga. 783, 35 S.E.2d 513 (1945), a contract made in 1931 for the construction of residential buildings provided that the contractor had to expend at least $6,000 for each building. Did this mean $10,000 in 1945, taking into account the devaluation of the dollar? The court held that no more than $6,000 had to be expended. Whether, under a different interpretation of the agreement, a gold clause would have existed is doubtful. A negative answer seems to be warranted since the contractor had not promised the payment of a sum of money to the other party.

27. See Taeuber, *Gold und Kredit im Mittelalter* (1933) 296, n. 864. In the late Middle Ages the Venetian *picciolo a oro* signified a *silver* value. Nagl, *supra*, p. 37, n. 33, at 191.

28. Swoboda-Wagon, *Die Arbitrage* (17th ed., 1928) 491.

29. See, e. g., Hubbard, *Soviet Money and Finance* (1936) 42, 43.

30. See Greek-Bulgarian Mixed Arbitral Tribunal, judgment of June 11, 1926, *Recueil des Décisions des Tribunaux Arbitraux Mixtes* VI 321 (a case involving Bulgarian "gold leva"). The Swedish Government, in a parliamentary paper advocating legislative invalidation of "gold crown" stipulations, declared that since Sweden's transition to the gold standard in 1873, the "crown," unit of the new gold standard, had customarily been called "gold crown" with no connotation of a gold clause. In this connection the Government pointed out that certain Swedish bonds, calling for payment partly in crowns and partly in gold crowns, had been marketed

ence in the contract to the new gold-dubbed unit does not amount to a gold clause; no protection therefore is offered to the creditor against depreciation of such "gold" units.[31] In that situation

at practically the same value. Printings of the Swedish *Riksdag* 1932, no. 264. See *infra*, n. 35. In 1931 Hungary gave to its new monetary unit the name "gold pengö." Decrees no 4560/1931 and no. 4000/1931 of Aug. 15, 1931, and Aug. 28, 1931. *Das Devisenrecht der Welt* (1932) 93.

In Uruguay the term "gold peso" could mean either the ordinary Uruguayan peso (paper peso) or the equivalent of the gold content of a peso defined in the monetary law. All depended upon the interpretation of the particular circumstances of each case. This theory was advanced in an award, In re *Empresa Constructora Uruguaya* A.S.S.M. v. *El Estado*, of June 16, 1942, *La Justicia Uruguaya* V 234, where the Government was held liable to pay the full gold amount. For information I am indebted to Dr. Alberto Schoo, Buenos Aires. Reliance on the intent of the parties appears similarly in Argentinian cases, *infra*, n. 37.

31. A doubtful situation arose in the case of the bonds of the Turkish *Société d'Heraclée*, issued before World War I, which called for payment of Turkish "gold piaster," Swiss Federal Tribunal, Feb. 11, 1931, *Amtliche Sammlung* 57 II 69; *J.D.Int.* 1931, 510. The company alleged in defense that the "gold piaster" was only a "money of account" (meaning an "ideal unit" as defined *supra*, p. 13) and that this "money of account" had depreciated, because, despite its name, it was in reality no longer on the gold parity prescribed by the law. The unfortunate wording of the defense entangled the court in a theoretical discussion of "money of account" which, the court pointed out, might be a monetary denomination not actually represented by a coin, such as the English guinea. The court then turned to a second meaning of the word, which it called "money of contract" as distinguished from "real money" (*"monnaie effective"*). The court took the former term to cover the "ideal unit". ["Money of contract" has a different significance, however, see *infra*, sec. 25 I.] The court then argued that if the ideal unit (gold piaster) coincides with the "real money the standard of which is gold", the promise to pay gold piasters must be construed as referring to "real money" that is to Turkish gold coins representing a multiple of a gold piaster. The existence of such gold coin, however, does not disprove the allegation that the so-called gold piaster had depreciated; *e. g.*, in the case of the Argentine gold peso and the Bulgarian gold leva gold coins representing those units were in existence. See Tate, *Modern Cambist* (28th ed., 1929) 111. Still, the court's holding is correct since in case of doubt the reference to gold must be interpreted as a gold clause, and the company's allegations as to the meaning of "gold piaster" were probably unfounded. Similarly, in *Syndic in bankruptcy of Salim Nasrallah Khoury v. Khayat*, [1943] A.C. 507, the Privy Council found a gold clause in the phrase "gold Turkish pounds." In neither case did it appear that the invalidation of gold clauses by the Turkish Government (*infra*, p. 281, n. 5) was pleaded by the parties.

The French courts, concerned with the *Heraclée* bonds, merely relied on the word "gold" without bothering about the problem involved. *Cass.*, July 7, 1931, *J.D.Int.* 1932,

an effective protection would have to be framed in terms specifically fixing the weight and fineness of the gold coins to be paid. However, the cases of mere gold "names" are exceptional and must be vindicated in the light of the history of the monetary unit in question. They offer no basis for interpreting away a reference to gold under ordinary circumstances.[32] That was done, however, in the case of a loan of one million marks "payable in gold", raised by the city of Karlsbad in 1896 from German subscribers. The Supreme Court of Czechoslovakia eliminated this undeniable gold clause. While conceding that the provision quoted might be a gold clause, the Court observed that the parties may merely have intended to indicate the gold-standard quality of the mark without seeking to give their words any special legal effect. In case of doubt the Court held the interpretation more favorable to the debtor should be applied.[33] The

403 at 416; App. Paris, March 23, 1928, *J.D.Int.* 1928, 698; App. Amiens, Jan. 27, 1932, *Sirey* 1932 II 158.

32. In the case of the Serbian and Brazilian loans, *infra*, sec. 29 I, the Permanent Court of International Justice correctly rejected the attempts of the defendant governments to throw overboard the payment-in-gold-francs clause by interpreting "gold franc" in the sense of "French franc". *J.D.Int.* 1929, 977 at 995. Elimination of a true gold clause, so to speak, with a most honest intent, namely, in order to enforce a promise given by the defendant, was accomplished in *Woodruff* v. *State of Mississippi*, 162 U.S. 291, 16 S.Ct. 820, 40 L.Ed. 973 (1895), *supra*, p. 226, n. 14. The bonds issued by a Mississippi Board acknowledged a principal indebtedness in gold coin, but the Supreme Court denied that this was a gold clause for the obscure reason that "the designated sums did not specify any particular kind of money". Although the dollar was then at par, the board sought to escape payment on the ground that it was given no power by the Mississippi laws to obligate itself in terms of gold. This shocking defense, sustained by the highest Mississippi Court, was overruled by the Court. Probably the rule that the interpretation of State statutes by the highest State court is binding upon the Supreme Court stood in the way of a sound construction of the Mississippi law by the Federal court, *cf. Supreme Lodge, Knights of Pythias* v. *Meyer*, 265 U.S. 30, 44 S.Ct. 432, 68 L. Ed. 885 (1924). That the power to borrow includes the power to promise payment in gold was affirmed in *Moore* v. *City of Walla Walla*, 60 F. 961 (C.C.D. Wash., 1894); *Parson, Leach & Co.* v. *Sinking Fund*, 97 Ky. 119, 30 S.W. 17 (1895), and with an eye to negotiable instruments, in *Judson* v. *City of Bessemer*, 87 Ala. 240, 6 So. 267 (1889). Cf. also *Greene* v. *Uniacke*, *infra*, p. 297, n. 77.

33. Judgment of March 17, 1927, *Zeitschrift für Ostrecht*, 1928, 1208 at 1209. The same rule was applied in favor of nationalized (previously foreign) Czechoslovakian insurance companies indebted on gold mark insurances. Judgment of Dec. 21, 1935, *Zeitschrift für Osteuropäisches Recht* (New Series) 1936, 330, annotated by Wahle. Compare also the Nor-

argument smacks of a desire of the court to protect its own nationals.[34] Judgments of this kind have also been rendered by other courts, including common law courts.[35]

Another objectionable device for eliminating an express gold clause was employed by the *Reichsgericht* to the prejudice of a Swiss mortgage creditor and in favor of a German mortgagor. In that case a mortgage was given to secure a pre-existing debt calling for payment of French francs. The mortgage deed and the debenture executed in 1928 and 1929 stated the debt in gold marks, however. The *Reichsgericht* remanding the case to the lower

wegian judgment discussed *infra*, sec. 29, n. 78.

34. The practical effect, in these cases, is to hold existing clauses ineffective. Legally, of course, the question of invalidity is entirely different. See *infra*, secs. 18 and 19.

35. *Modiano Brothers & Son* v. *Bailey & Sons*, 47 Lloyds L.R. 134 (K.B., 1933). A *c.i.f.* contract on a London Corn Exchange form contained this clause "Freight collect on basis of £ equal to 4.85 U. S. gold dollars, shipowners to have option of collecting U. S. dollars or their own country's currency at ruling rate of exchange for U. S. gold dollar". The creditor was Belgian, the debtor English. The court told the parties that "gold dollar" meant nothing but "dollar". There were no facts supporting this construction. In *Derwa* v. *Rio de Janeiro Tramway, Light & Power Co.* (a Canadian corporation), [1928] 4 D.L.R. 542, the Supreme Court of Ontario held that the bonds of the defendant, phrased in French "*obligation 500 fr. 5% or . . .*" and described in the prospectus as "gold bonds" were not gold bonds because no gold clause was attached to the promise to pay (sic). *St. Pierre* v. *South American Stores (Gath & Chaves)*, [1937] 3 All E.R. 349 (C.A., 1937), is different. A clause in a Chilean lease to pay X "pesos of 183.057 millionth of a gram of fine gold" was declared to be a promise to pay X pesos only, because Chilean law, as settled by numerous decisions of Chilean lower courts, required this interpretation. Astounding as the interpretation is, the Court was bound by it under the law of evidence. These Chilean cases were, however, overruled by the Chilean Supreme Court, Jan. 8, 1938. See *Comparative Law Series* (U.S.Dept. of Commerce) 1 New Series 84 (1933).

The Supreme Court of Sweden too, has joined the group of sham-gold-clause discoverers. Bonds of an 1885 loan of the *City of Stockholm* called for payment in *kronors* or *marks*, "in gold", but the Court maintained that this constituted a reference to monetary conditions existing at the time of the issue, rather than a gold clause. Judgment of June 10, 1938, *Bull I.I.I.* XXXIX (1938) 108. The case did not come under the law of June 17, 1932, *infra*, p. 281, n. 5. See also *supra*, n. 30. Cass. Costa Rica, Nov. 16, 1943, reported in Nussbaum and Schoo, *Significado de la Clausula Contractual "Cen tavos oro Americano"* (1944) 81 interpreted the clause mentioned in the title as indicating dollars pure and simple on the untenable ground that without specification the reference to gold was irrelevant. On an international conflict caused by an attempt of the Chinese government to interpret away a gold clause, *infra*, sec. 30, n. 36.

Court suggested that only (depreciated) French francs were owed. The judgment appealed from, the *Reichsgericht* pointed out, did not indicate "economic" reasons for the substitution of gold marks for francs.[36] Yet whatever the economic motivation of the parties, they had stipulated unambiguously for payment in gold and this should have been recognized by the court. Besides, economic motivation for the shift to German currency was by no means absent, since in 1928 and 1929 the reichsmark was considered by many as more stable than the franc.

Argentine practice again exhibits peculiar features. There "gold peso" was generally understood to mean (not simply "peso" but) 2.27 paper pesos, that is, 2.27 of actually circulating pesos—a result reached not through application of a hard and fast rule, but through an appraisal of the intent of the parties.[37]

Section 17

OPERATION OF GOLD CLAUSES

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I. Limited Significance of the Subject Matter

While much thought and labor—legislative, judicial and theoretical—have been expended upon the problems connected with the existence and the validity of gold clauses, there has been little discussion of their *operation*. This deficiency is easily ex-

36. Judgment of March 7, 1938 *J.W.* 1938, 1391.

37. After much controversy, the Supreme Court made it clear that the ratio, 1 gold peso=2.27 paper pesos had not the force of law; a promise to pay "gold pesos of the Monetary Act of 1881" was therefore held to obligate the debtor for the full gold equivalent of pesos as defined by that Act. Judgment of Sept. 29, 1941, *Revista de Jurisprudencia Argentina* LXXVI 389. The Appellate Court of Buenos Aires had repeatedly held to the contrary; decisions of Dec. 30, 1938, *ibid.* LXIV 831, and Dec. 26, 1939, *ibid.* LXIX 158. The Supreme Court itself, as late as Nov. 20, 1940, *Revista de Jurisprudencia Argentina* LXXII 332, construed a "gold peso" *coin* clause in the light of the 2,27 ratio. Cf. Schoo, "The Argentine Monetary System and the Gold Clause," *The Review of the River Plate* of April 20, 1949.

Earlier Argentinian gold clause cases were discussed by App. Paris, July 30, 1930, *D.P.* 1934 I 78.

plained. As long as the gold standard is unimpaired, paper money is just as good as and even more handy than gold. Business goes on as if the clauses did not exist. However, when the gold standard has been abandoned courts and legislatures almost everywhere compete with the debtors in making the clauses ineffective. In the case of foreign creditors the collection of gold claims has been further impaired by the spread of exchange control. The main instances of actual enforcement, are the American cases during the greenback period.[1]

II. The "Tantalus" Interpretation

One of the primary obstacles to the effectiveness of gold clauses consisted in their customary phrasing: with relatively few exceptions they were framed as gold coin clauses pure and simple. Creditors or their legal counsel believed this device to be the safest. Actually they did the wrong thing. When inflation comes gold coins disappear from circulation. This is evident where gold coins are requisitioned by the government, but also less incisive measures—for instance, the prohibition to sell the coins at a premium—will drive them from circulation. Under such conditions debtors obligated under gold clauses will quite naturally plead impossibility to deliver the coins; instead they will offer the nominal amount of the debt in depreciated currency. But should not they at least have to pay the equivalent of the coins? As will be seen, a number of courts have actually held that since gold *coin* was stipulated, the creditor cannot be awarded the value of the corresponding quantity of gold.

Still, the creditors or their counsel may be excused to some extent for their lack of foresight. Perhaps nobody could expect the courts to espouse such a theory. In fact, under it the gold coin clause, though used by business men the world over, appears to be the invention of dreamers or the incredibly ignorant. It offers protection exactly so long as it is not needed and disappears as soon as it would be helpful. Tantalus is no longer a character of fable; he exists or existed by the million, in the law.

Evidently the "Tantalus" construction is preposterous. When a debtor promises to pay in gold coin, and gold coin is no longer obtainable, a secondary promise to pay the equivalent, in currency, of the gold promised must be implied.[2]

1. *Infra*, sec. 42 at n. 63.

2. This construction of the gold coin clause was developed by the present writer in "Comparative and international aspects of American gold clause abrogation", 44 *Yale L.J.* 53 at 56 (1934) and was subsequently used by the Supreme Court in *Norman v. Baltimore and Ohio R.*

The erroneous doctrine was stubbornly used after World War I by the *Reichsgericht* [3] which had been led into an impasse by a decision of 1902 permitting gold clauses to be recorded with mort-

Co., 294 U.S. 240 at 299, 55 S.Ct. 407, 79 L.Ed. 885 (1935). Post and Willard, "The power of Congress to nullify gold clauses", 46 Harv.L. R. 1225, 1234 (1933), had suggested five possible "reasonable" constructions of the customary American gold clause, all of them different from the one mentioned: (1) that it is a pure bullion contract; (2) that it is a single obligation to deliver gold coins containing the amount of gold as indicated by the agreement; (3) that it is an alternative obligation, with an option in the obligee to take gold coins or their value in paper dollars; (4) that it is an alternative obligation, with a corresponding option in the obligor; (5) that it is a single obligation to pay the nominal amount of the debt in any form the obligor chooses. The authors preferred the third construction. The creditor should be entitled to the nominal amount in paper currency even if the debtor, as happened in *Butler* v. *Horwitz*, 7 Wall. (74 U.S.) 258, 19 L.Ed. 149 (1868), and *Dewing* v. *Sears*, 11 Wall. (78 U.S.) 379, 20 L. Ed. 189 (1871), should insist, in case of adverse judgment, upon making payment in coins. This is contrary to the above cited decisions of the Supreme Court, and unjustifiable in itself. Under the gold clause as described, the debtor has a right to make payment in gold. See *infra*, n. 24.

3. Judgments of Jan. 11, 1922, *R.G.Z.* 103, 384; of March 1, 1924, *ibid.* 107, 370; of May 24, 1924, *ibid.* 108, 176. The argument rests on § 245 of the German Civil Code: "If a debt has to be paid in a particular kind of coin which, at the time of payment, is no longer in circulation, the payment must be made as if the particular kind of coin were not provided." The case of a depreciated currency is not contemplated by this provision. Again inflation was far from the imagination of the draftsmen of the Code who only intended to regulate the effect of impossibility in the situation presupposed by § 245. See the writer's *Das Geld* (1925) 84. In the judgment of April 26, 1928, *R.G.Z.* 121, 110 the court, answering its critics, points out that at the time of contracting the silver thalers were still legal tender (like the silver dollars in the United States, *infra*, sec. 43 I), and that the creditors, by the gold clause, merely sought protection from "loss" through the receipt of thalers. The Court did not see that as long as the German monetary system remained intact, there could not possibly be a "loss" through the receipt of thalers, whereas, as soon as gold coin obtained a premium, the objective aimed at by the parties could only be reached by a gold value clause. Nevertheless, the Swiss Federal Council (not the *Tribunal*), supervisory board of the Swiss Land-Register system, approved the theory of the *Reichsgericht*, release of Jan. 15, 1924, *Schweizerische Juristenzeitung* XX (1924) 309. This was obviously done in order to demonstrate the futility of gold clauses and thereby to keep them off the Swiss land registers. *Supra*, p. 228, n. 26. The correct theory was used by the *Reichsgericht* in an early case, March 1, 1882, *R.G.Z.* 6, 125, and again on May 28, 1936, *J.W.* 1936, 2058, when the Court, without mentioning its former holdings, read a tacit gold value agreement into a typical American gold coin clause.

gages [4] on the theory that they represented sums certain. The English Court of Appeal,[5] the High Court of Australia,[6] the Belgian Court of Cassation,[7] and several courts of first resort [8] succumbed without such excuse to the same fallacy. That a gold value clause is included in a gold coin clause has, however, been recognized by the Supreme Court of the United States,[9] the English House of Lords,[10] and by the highest courts of Denmark,[11] Finland,[12] the Netherlands,[13] Sweden [14] and Czecho-Slovakia,[15]

4. *Infra*, n. 33.

5. In *Feist* v. *Société Intercommunale Belge*, [1933] Ch. 684 (C.A., 1933).

6. In *Jolley* v. *Mainka*, 49 C.L.R. 242 (High Court of Australia, 1933), *infra*, n. 31.

7. Belgian Cass., June 12, 1930, *Pasicrisie Belge*, 1930 I 245; April 27, 1933, *J.D.Int.* 1933, 739. The first case is particularly puzzling since the amount payable had been articulated by the parties as *payable au cours d'or*, thus indicating a gold value clause. The Belgian decree of Aug. 2, 1914, *infra*, p. 280, n. 4, abrogating the gold clauses, was interpreted by these decisions as only referring to gold coin clauses. *Infra*, p. 294 at n. 60.

8. *Irving Trust Co.* v. *Hazlewood*, 148 Misc. 456, 265 N.Y.Supp. 57 (1933); *American Chicle Co.* v. *Somerville Paper Box Co.*, 50 Ont. L.R. 517 (Sup.Ct. of Ontario, 1921) [inefficacy of a gold coin clause stipulated on behalf of an American creditor, the court relying especially on a Canadian gold export prohibition]; *International Trustee, etc.*, v. *The King*, [1937] A.C. 500, 512 (C.A., 1936), *reversed*, [1937] A.C. 528 (H. of L.).

9. *Norman* v. *Baltimore and Ohio R. R. Co.*, 294 U.S. 240, 55 S.Ct. 407, 79 L.Ed. 885 (1935).

10. *Feist v. Société Intercommunale Belge d'Electricité*, [1934] A.C. 161 (H. of L., 1933). While the finding that the parties had intended to use a gold value clause ostensibly rests upon the particular circumstances of the case, the judgment is of general significance since circumstances of the type referred to exist in practically every case of a gold coin stipulation. See *Rex* v. *International Trustee*, [1937], A.C., 500, 556 (H. of L.,); *British & French Trust Corp., Ltd.* v. *New Brunswick Railway Co.*, [1939] A.C. 1 (H. of L., 1938); *Syndic in bankruptcy of Salim Nasrallah Khoury v. Khayat*, [1943] A.C. 507 (Pr.C.). However, there are some debatable points in the *Feist* case. The court felt that the clause was a value clause because there were no gold coins in circulation at the time of contracting. This is not conclusive since the parties might have intended payment in gold coin to be made after the re-establishment of the gold standard. The court furthermore set up against the theory of a pure gold clause the fact that a fractional amount of the interest due is too slight to be represented in gold coin. However the gold coin clause bears only on the amounts representable by gold coin, save minor remainders to be paid in other currency and unimportant for that reason.

11. Jan. 21, 1933, *Z.A.I.P.* 1933, 960.

12. Jan. 18, 1933, *Z.A.I.P.* 1933, 467.

13. Hooge Raad, March 13, 1936, *Nederlandsche Jurisprudentie*, 1936, 497 and 506, regarding the loans of

14. See note 14 on next page.

15. See note 15 on next page.

as well as by the Permanent Court of International Justice [16] and by other tribunals.[17] Thus, the "Tantalus" interpretation has been rejected by the great weight of authority. As the Permanent Court well said: "Treating the gold (coin) clause to indicate merely a mode of payment, with no reference to a standard of value, would not be construction but nullification of the clause" [18] —words repeated by the Supreme Court of the United States.[19]

III. Gold Clauses as Debts of "Sums Certain"

There is another difficulty with gold coin clauses. Is the obligation to supply the obligee with a definite amount of gold coin "monetary" in nature and therefore a debt; or is it an obligation to deliver commodities? In a strict legal sense, there is no debt since the obligor has not the liberty, characteristic of debts, to choose which of the available kinds of media of payment he will employ.[20] The commodity feature of the clause is emphasized

the Royal Dutch and the Bataafsche Petroleum Co.

14. Judgment of Jan. 30, 1937, in *Skandia Insurance Co., Ltd.* v. *The Swedish National Debt Office*, *Bull. I.I.I.* XXXVI (1937) 327 [English translation in *Guldklausulmålet* III (Stockholm, 1937), 133, 147.]

15. Cases recognizing the gold clause and cited *infra*, p. 276, n. 75.

16. July 12, 1929, *J.D.Int.* 1929, 977 (Serbian Loan case).

17. App. Trieste, June 27, 1939, *R.D. Comm.* 1939 II 68 [bonds of *Lloyd Triestino*]: Oslo Municipal Court, Nov. 17, 1936, tr. in Plesch, *The Gold Clauses*, II (1936), 91, reversed on other grounds by Supreme Court of Norway, Dec. 8, 1937, *Bull. I.I.I.* XXXVIII (1938) 71, *Revue de Science et de Législation Financières*, 1937, 646; Greco-Bulgarian Mixed Arbitral Tribunal, Dec. 4, 1925, *Recueil des Décisions des Tribunaux Arbitraux Mixtes* VI 316.

18. *J.D.Int.* 1929, 977 at 996.

19. In *Norman* v. *Baltimore and O. R. Co.*, 294 U.S. 240 at 299, 55 S.Ct. 407, 79 L.Ed. 885 (1935).

20. *Supra*, p. 139. In Y.B. 9 Edw. IV 49 (Hil. T. Pl. 6, 1470), *supra*, p. 223, n. 2, the plaintiff brought an action of debt in the *debet et detinet* for the nominal amount in pounds sterling of the nobles and groates as of the time of contracting. The defendant set forth that the action did not lie in the *debet* because of the commodity character of the claim. In addition he alleged a variance between declaration and evidence because the nobles had been raised meanwhile thus enhancing the debt beyond the amount claimed. The determination of this defense, illustrating common law procedure, is not reported.

As late as 1695–96 a dictum of Lord Holt, C.J., stated that the gold premium of the guinea was not recoverable in an action of debt (*Pope* v. *St. Leiger*, 5 Mod. 1, 87 English Rep. 481 (1695)). It could, however, be recovered as damages in an action on the case. *Fenwot and Burroughs Case* (1694), referred to in 1 Lutwyche 484 at 488, 125 Eng.Rep., at p. 257. The statute of 1552 prohibiting dealings in gold coins above their legal value (5 & 6 Edw. VI c. 19, repealed 2 & 3 Will.

by the customary American formula indirectly fixing the quantity of coins owed, in terms of weight. Nevertheless, after some hesitation,[21] the American courts, during the greenback period, did treat these coin obligations as debts.[22] They did even more: where the law required sums certain, a gold clause obligation would do; particularly, negotiable instruments were allowed to be expressed in gold coins.[23] Judgments were given in like terms,[24] and the rule restricting damages for delayed payment to legal interest was also applied to gold coin obligations.[25]

After the greenback period the view persisted that gold clauses may be incorporated in negotiable instruments;[26] in fact, this happened on the largest scale in the case of corporate bonds. Hence that view must probably be considered a definite part of the American law on negotiable instruments. Regarding Eng-

IV, c. 34 [1832]) was not mentioned in these cases.

21. *Bronson* v. *Rodes*, 7 Wall. (74 U.S.) 229, 19 L.Ed. 141 (1868).

22. *Trebilcock* v. *Wilson*, 12 Wall. (79 U.S.) 687, 694, 20 L.Ed. 460 (1871); *Thompson* v. *Butler*, 95 U.S. 694, 697, 24 L.Ed. 540 (1877); *Norman* v. *Baltimore and Ohio R. R. Co.*, 294 U.S. 240, 302, 55 S.Ct. 407, 79 L.Ed. 885 (1935); *Howe* v. *Nickerson*, 14 Allen (96 Mass.) 400, 401 (1867) [excellent opinion delivered by Mr. Justice Gray]. The same theory is to be found in *Jolley* v. *Mainka*, 49 C.L.R. 242 at 248 and 265 (High Court of Australia, 1933).

23. *Chrysler* v. *Renois*, 43 N.Y. 209 (1870).

24. *Bronson* v. *Rodes*, 7 Wall. (74 U.S.) 229, 19 L.Ed. 141 (1869) [inconsistent with the commodity (bullion) theory adopted]; *Trebilcock* v. *Wilson*, 12 Wall. (79 U.S.) 687, 20 L.Ed. 460 (1871); *Thompson* v. *Butler*, 95 U.S. 694, 24 L.Ed. 540 (1877). In *Gregory* v. *Morris*, 96 U.S. 619, 24 L.Ed. 740 (1877), a judgment for the tortious detention of personal property was rendered in terms of ordinary dollars but for a sum equal to the gold value of the specified amount of coins.

Debtors sometimes insisted on a "gold" judgment should the case go against them, a conduct not easy to explain. *Butler* v. *Horwitz*, 7 Wall. (74 U.S.) 258, 19 L.Ed. 149 (1868), and *Deming* v. *Sears*, 11 Wall. (78 U.S.) 379, 20 L.Ed. 189 (1871).

25. *Wilson* v. *Morgan*, 27 N.Y.Super. Ct. (4 Rbt.) 58, 72 (1866); *American Chicle Co.* v. *Somerville Paper Box Co.*, 50 Ont.L.R. 517, 525 (Sup.Ct. of Ontario, 1921).

26. *Eastman* v. *Sunset Park Land Co.*, 35 Cal.App. 628, 170 P. 642 (1917); *Wright* v. *Morgan*, 37 S.W. 627 (Tex.Civ.App., 1896), regarding an alternative gold coin-gold value clause, *supra*, p. 230. *The Uniform Negotiable Instruments Law*, § 6, provides that "the validity or negotiable character of an instrument is not affected by the fact . . . (5) that it designates a particular kind of current money in which payment is to be made." This provision is omitted in the Code of Commercial Law drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Law (1948).

lish law the situation is not clear. In a case of 1943, the Privy Council, applying the rule of the English Bill of Exchange law, declared as negotiable a promissory note for the payment of "2000 gold Turkish pounds." [27] Strangely, the court deemed this clause to be a pure gold *value* clause—a construction unique in the vast body of gold clause decisions. An even more surprising facet of the judgment consists in the fact that the court did not touch upon the question of whether a gold value obligation is a debt of a "sum certain." Had the court done so with a negative result, the ruling would have been necessarily opposite.[28] The effect of the decision as it stands seems to be that under English, just as under American law, instruments with gold clauses can be negotiable. Considering the tremendous spread of these instruments one may admit that the result is desirable.[29] Of course, all this does not apply to gold clauses contracted for in the teeth of exchange control.[30]

In civil law countries an analogous problem emerged during this century, namely, whether or not mortgages couched in terms of gold coin [31] could be recorded in the land registers. On principle, the German [32] and other civil law systems require mortgage-obligations to be expressed in sums certain of money in order to keep the existing charges on real estate determinate and easily calculable. An obligation to pay in gold is an obligation for a sum certain only so long as the currency is on gold. The *Reichsgericht,* in 1902, permitted recording of a mortgage containing the clause "all payments have to be made in gold." [33] At that time

27. *Syndic in bankruptcy of Salim Nasrallah Khoury* v. *Khayat*, [1943] A. C. 507 (Pr. C.).

28. The decision has been criticized from this point of view also by Mann, 59 L.Q.Rev. 303 (1943).

29. In continental practice gold clauses were apparently not much employed for short-term commercial paper though there is some German emergency legislation in point, infra, n. 42. App. Berlin (*Kammergericht*), Sept. 18, 1924, *J.W.* 1925, 642, an isolated case, held a bill of exchange expressed in "dollar-gold-marks" (*supra*, p. 235, n. 61) negotiable as being couched in a *Rechnungswährung, supra*,—a questionable theory.

30. *Infra*, sec. 31.

31. There are neither cases nor discussions of this issue in common law countries, it seems. In *Jolley* v. *Mainka, supra*, p. 250, n. 6, a gold mortgage was involved, but the property was situated in the formerly German New Guinea. The present writer also knows of an English gold mortgage executed for a foreign creditor in the period before 1931.

32. German Civil Code, § 1115 requires that the monetary amount of the debt, secured by the mortgage, be recorded.

33. Order *(Beschluss)* of Jan. 22, 1902, *R.G.Z.* 50, 145. A thorough discussion of the problem involved, which had already appeared before 1900, under Prussian law, had pre-

ten and twenty-mark gold coins were circulating in Germany. The court seems to have been unable to conceive that the German monetary situation could ever deteriorate. This appears to be the explanation for the rather meaningless assertion of the court, that, if 15, 30, 50 or 100 mark gold coins should be issued in the future, the amount of the debt would not be affected by the clause. The latter assertion was, of course, true, but it missed the point of the clause; in reality the parties were looking to a situation in which gold coin should be *at a premium*. What the creditor, alarmed by the bimetallistic agitation, wanted, was protection from a deterioration of the currency. The Court's lack of understanding of the intention of the parties is only explainable on the ground that in 1902 German monetary circulation was really saturated with gold. Checks were little used, and contrary to conditions in the United States, gold coins were commonly employed in ordinary payments. Nor was there any reminiscence of inflation. By 1902 the slightly inflationary paper money issued by Prussia during the Napoleonic wars [34] and redeemed at par after Napoleon's defeat was long forgotten. The result was that gold clauses were incorporated in many German mortgage deeds particularly in those used by banks, insurance companies and similar organizations. When inflation developed grave consequences appeared in the domestic as well as in the international sphere.[35] The error of the *Reichsgericht*, as has been pointed out, most probably accounts also for the judicial adoption of the "Tantalus" interpretation.

Austrian courts have permitted the recording of "gold" mortgages in the land books without resorting to the erroneous proposition of the *Reichsgericht*.[36] Gold mortgages do not seem to be recordable in France [37] or Italy.[38] The same rule is believed by

ceded this final adjudication by the Supreme German Court. See Bulling, *Die Wirksamkeit der Goldklausel* (1894) and Merfeld, "Die Goldklausel bei Hypotheken", *Gruchots Beiträge zur Erläuterung des Deutschen Rechts* XXXIX (1895) 574, a study of more than local interest. See also Bratel, *La Clause Or et la Clause de Paiement*, etc. *dans le Droit Allemand Contemporain* (thesis Dijon, 1930), 32.

34. *Supra*, p. 50, n. 29.

35. *Infra*, p. 444.

36. App. Vienna, 1923, *Die Rechtsprechung* V (1924) 273; March 10, 1925, *Juristische Blätter* 1925, 91. The same rule prevailed in Czechoslovakia, Supreme Court of Czechoslovakia, Nov. 12, 1937, *Zeitschrift für Osteuropäisches Recht* (New Series) IV (1938) 469.

37. See App. Paris, Feb. 21, 1925, *J.D. Int.* 1925, 745 [requiring, in the case of a Swiss-franc debt, the recording of a definite equivalent in terms of French francs]. Important consequences were drawn by French courts from this rule. *Infra*, p. 399.

38. See Scaduto, *I Debiti Pecuniari*

noted writers to be the Dutch law.[39] Gold clauses have been of considerable importance in Argentine mortgage practice.[40]

Rendition of judgments in terms of gold units is generally no problem in civil law owing to the absence of the rule *omnis condemnatio pecuniaria*.[41] In Germany, provisions designed for "sums certain" were sometimes extended to gold units by legislation.[42]

There remains, however, the question of how forced execution of judgments couched in terms of gold obligations can be carried out. The difficulty with gold coin judgments is that the marshall may not find such coins in the possession of the debtor. On the other hand, a gold value judgment will leave him in the dark[43] unless the court has fixed the equivalent in currency, a procedure which, of course, discards fluctuations subsequent to the fixation. Only the procedural laws of the debtor countries can furnish the answer.[44] The fact that legislative and judicial documentation on the point is extremely scanty is another indication that there have been very few cases of gold clauses enforced by judgment and execution.

In retrospect, comparative inquiry reveals a definite trend toward placing amounts computable under gold clauses on the same

e Il Deprezzamento Monetario (1924) 83. The text of the Civil Code of 1942, §§ 2809, 2838, 2839[4] is not conclusive.

39. Engelberts-Vissering-Libourel, *Inflatie en Goud-Clausule in Nederland* (1922) 55 and Meyers, *Weekblad voor Privaatrecht, Notarisambt en Registratie* (1924) 185 at 187. *Cf.*, however, law of May 24, 1937, *Staatsblad*, 1937, no. 204 (*infra*, p. 281, n. 5) annulling gold clauses in mortgages made before September 27, 1936.

40. See Schoo, *La Clausula Oro* (1937) 370, *supra*, pp. 197, 247.

41. *Supra*, p. 153.

42. Particularly by the mortgage legislation discussed in the following pages and by the decree of Feb. 6, 1924, *R.G.Bl.* 1924 I 50, allowing bills of exchange and checks to be couched in terms of gold marks. The decree was abrogated by laws of June 21, 1933 and Aug. 14, 1933, *R.G.Bl.* 1933 I 409 and 605 and by decrees of Nov. 28, 1933, *ibid.* 1933 I 1019. A decree of June 27, 1924, *R.G.Bl.* 1924, I 660, Art. I (1) (b), provided specific rules for the mode of reference in judgments and confessions of judgment (*vollstreckbare Urkunde*) to the various types of "goldmark."

43. The Court Vaud, Aug. 10, 1938, *Schweizerische Juristenzeitung* XXXV (1938) 170, acting in the capacity of supervising authority on execution, declined enforcement of a gold-value judgment beyond the basic amount of Swiss francs on the ground that there was no way of officially determining the gold value. See *infra*, p. 278, n. 92.

44. The Act of March 3, 1865, 13 Stat. 494, § 12, prescribed that in the case of a gold-coin judgment for customs, the marshall, when selling the debtor's property, must require payment in gold.

level as "sums certain." The strength of this trend is illustrated by the observation that two courts as heterogeneous as the Privy Council and the *Reichsgericht* arrived at the same theory, and both of them at the cost of logic.[45]

IV. Statutory Determination of Gold Value

In order to make gold clauses workable in any contingency, draftsmen and legislators have developed minute schemes for the ascertainment of the value of gold. Because of the later repudiation or abrogation of gold clauses, and because of the introduction of exchange control and *moratoria,* the schemes have not won much practical importance, but they are interesting for sheer craftsmanship, and as evidence of the inordinate difficulties inherent in the use of gold clauses (and—one may add—in any attempt to overcome the nominalist feature of modern money by contract clauses).

In view of the dominant position of the London gold market before 1931,[46] adoption of London quotations was then the rule. Their use was prescribed by a German decree for gold-clause mortgages,[47] but the same method was employed also in other jurisdictions.[48] The elaborate and significant German regulation may be described in some detail.

Since the London market, of course, trades in terms of ounces and of pound sterling, its quotations had to be converted into terms of grams and marks for German transactions. As the parties could not be expected to carry out this complicated regulation at each payment, a weekly publication of London prices in terms of grams was provided by the German government and made binding upon the parties and the courts.[49] The price of the

45. The Swiss Federal Council, too, joined this group, *supra*, n. 3.

46. As to the London bullion market, see S. E. Thomas, *The Principles and Arithmetic of Foreign Exchange* (1934) 355.

47. Decree of June 29, 1923, *R.G.Bl.* 1923 I 482, discussed in the writer's *Vertraglicher Schutz gegen Schwankungen des Geldwertes* (1928) 40; it was replaced by the decree of Oct. 10, 1931, *R.G.Bl.* 1931 I 569, analyzed in Planck's *Kommentar zum Bürgerlichen Gesetzbuch* III (5th ed., 1935), 991. Regarding the various "gold mark" types of German finance, see *supra*, n. 235.

48. For instance, in Austria for regulating the gold *schilling*, Austrian Supreme Court, Feb. 1, 1933, *Die Rechtsprechung* 1933, 45 (Ann. by Wahle). Under the Italian decree of Jan. 10, 1918, no. 26, *Raccolta Ufficiale*, 1918 I 65, gold was to be officially fixed on the basis of the London rates; by a decree of July 17, 1921, n. 1063 *Raccolta Ufficiale*, 1921 III 2785, however, the dollar rate on New York was made the standard.

49. Decree of 1923 (*supra*, n. 47),

gram was expressed in pence and since the breakdown of the pound in 1931, in reichsmarks for the sake of convenience.[50] These were indispensable simplifications. But slight as their effects were, they introduced extrinsic and distorting elements into the reckoning process; *viz.*, the Berlin rate of exchange of the pound; the fixation for a week's term, of a gold price which in fact varied during the week; and the postponement of the quotations, since the German official publications at best could only give London quotations of the preceding or even an earlier day. Moreover, the calculation to be accomplished by the parties remained formidable. With the kilogram of fine gold equivalent to 2790 gold marks, we obtain the following equation, in which the price of the grams of gold expressed in German currency is called g, the gold mark GM, and the sum due x:

$$2790\ GM = 1000g$$

$$1\ GM = \frac{1000g}{2790}$$

$$x\ GM = \frac{1000gx}{2790}$$

Such calculations certainly strained the ability or willingness of ordinary creditors and debtors. Still another trial awaited them. Which day was to be the law day? In order that the reckoning may be done in time, and the necessary payments prepared, the law day must be antedated by agreement. Such antedating indeed became customary in German gold-mortgage deeds, particularly where the mortgagee was a bank or a similar institution. For practical reasons the legal date was fixed half a month or more earlier than the day of payment.[51] The interim risk of inflation was thereby shifted to the creditor and turned out very great under rapid inflation.[52]

§ 2; release of the Minister of National Economy [*Reichswirtschaftsminister*] of July 20, 1923, *Deutscher Reichsanzeiger* of July 23, 1923.

50. Decree of Oct. 10, 1931, *R.G.Bl.* 1931 I 569.

51. The question whether the day of payment or the day of maturity should be used in the computation of the amount owed, is far more important in the conversion of foreign currencies and will be treated in that connection, *infra*, sec. 25 II III. In regard to gold clauses Italian courts favored a day-of-maturity theory, Ascarelli in *Z.A. I.P.* 1928, 793 at 811, n. 4, while the Esthonian Cass., Nov. 10, 1937, *J.D. Int.* 1939, 435, looked at the time when the suit was brought.

52. See *Reichsgericht*, Nov. 13, 1924, *R.G.Z.* 109, 174 [concerning a "rye" mortgage]. *Infra*, p. 302, at n. 10.

While such minute elaboration was confined to Germany the inconveniences and difficulties attending actual enforcement of the clauses were everywhere apprehended and gave rise to modifications of the clause. Of primary importance was a provision according to which deviations of the gold price from parity were to be taken into account only when the difference exceeded a definite percentage either way.[53] This clause, which may be called a "clause of tolerance,"[54] is found in all kinds of protective monetary clauses and was in almost universal use.[55] In German mortgage practice it ordinarily read: "The debtor has to pay one reichsmark for each gold mark, unless the price of a kilo of fine gold either exceeds 2820 or declines below 2760 reichsmarks."

53. Another difficult problem is the determination of the law day in case the debtor does not pay in time. *Vertraglicher Schutz*, etc., *supra*, n. 47, at 49 and 45.

54. *Supra*, p. 61 "Tolerance" with regard to coins refers only to a deficiency in value; applied to the creditor-debtor relationship, however, the term allows the inclusion of an increment in the intrinsic value which the debtor has to "tolerate". The *Reichsgericht*, Feb. 10, 1932, *R.G.Z.* 135, 142 employed the term *Schwankungsklausel* (fluctuation clause) but this hardly conveys the idea.

55. Including foreign-currency and "index" clauses. The tolerance clause has been passed upon in the following cases: App. Paris, July 1, 1931, *Gazette du Palais* 1931 II 886 [index clause, 10%]; App. Douai, May 23, 1933, *Revue du Droit Bancaire* 1934, 276 [exchange guarantee clause, almost 50%]; Ital. Cass. Jan. 10, 1936, *R.D.Comm.* 1936 II 386 [gold clause, about 10%]; App. Milan, July 19, 1934, *ibid.*, 1935 II 531 at 540 [gold dollar clause, 2%]; same court, Nov. 5, 1937, *Foro Italiano* 1938 I 648 [gold value clause, 10% in either direction]; Court Torino, May 22, 1934, *R.D.Comm.* 1935 II 531, 569 [combined sterling and index clauses, 10% in either direction]; Court Padova, Feb. 1, 1938, *Foro delle Venezie* 1938, 304 [gold lire clause, 10%]; App. Brussels, March 9, 1935, *Belgique Judiciaire* 1935, 339 [exchange guaranty clause, approx. 12%]. Other examples of tolerance clauses are found in the American-Cuban Sugar Agreement of 1946 [index clause 2%]—*infra*, p. 305 —, in the bonds of the former Rand Cardex Corporation [index clause 10% in either direction] *infra*, p. 305, in the form of an Australian lease deed, *infra*, p. 304, n. 25, and in collective bargaining agreements, *infra*, p. 303. The Prussian legislature resorted to a tolerance clause as early as 1808, *supra*, p. 221.

In the Torino case it was correctly held that should the increase or decrease exceed 10%, the whole spread—tolerance plus excess—must be considered in the computation of the payment. In the Douai case a "temporary" excess over the tolerance was disregarded, a highly debatable holding. A desirable provision might be one allowing only for fixed major deflections. Under the terms of the Rand Cardex loan, deflections of less than 10 percent were disregarded. Deflections of more than 10 percent but less than 20 percent were therefore treated as equivalent to deflections of 10 percent and so on.

This clause, allowing a "tolerance" of little more than two per cent, was favored by the courts [56] and was prescribed by law for certain types of mortgage bonds.[57] A twenty per cent "tolerance" (ten above and ten below) seems to have been more usual. International agreements sometimes allow the signatory governments to convert gold amounts into "round numbers," [58] that is, they demand only approximate accuracy.

Another and not infrequent proviso requires the debtor to pay no less than the nominal amount contracted for; for instance "1000 gold mark, but not less than 1000 reichsmarks." ("Minimum clause").[59] Under this clause, an appreciation of the agreed currency over parity would give the debtor no right to reduce his payment. Besides a "tolerance" clause there is no practical necessity for a "minimum" proviso.

Under present conditions the most important aspect of gold clauses bears upon international relations which present some special problems.[60]

V. Impact of Devaluation

An important question arises where the monetary unit secured by the gold clause is devalued. This issue was sharply focussed after World War I by the numerous post-war German contracts between Germans or other non-Americans calling for payment of so-called "dollar-gold-marks," generally defined by contract and by statutes [61] as a fraction (10/42nds) of the American dol-

56. It was held that after registration of a mortgage has become effective, a tolerance clause may subsequently be inserted without the assent of the junior mortgagees. *Reichsgericht*, Feb. 10, 1932, *R.G.Z.* 135, 142. However, the tolerance clause may affect their interest because a shrinking of the first mortgage, due to a decline of the gold price, will be prevented by the clause within the limits of the tolerance.

57. Decree of July 28, 1926, *R.G.Bl.* 1926 I 423.

58. Thus the (Brussels) International Convention of 1924 for the Unification of Certain Rules Relating to Ocean Bills of Lading, League of Nations, *Treaty Series* LXX 159, § 9 and in the (Warsaw) Convention for the Unification of Certain Rules Regarding Air Transport of 1929, Hudson, *International Legislation* V (1936) 100 § 22 IV.

59. Under the Central European land-book system, registration of minimum clauses encounters technical difficulties. See Planck, *Kommentar zum Bürgerlichen Gesetzbuch* III (5th ed., 1935), 992. Austrian courts found the minimum clause unrecordable. App. Vienna, June 27, 1935, *J.D.Int.* 1936, 444 [calling it "paper clause" because the sum due—in the above instance —would be at least 1000 "paper" schillings].

60. *Infra*, p. 441.

61. Thus by the decrees having the force of law, of Feb. 6, 1924, § 1, *R.G.Bl.* 1924 I 50; of Feb. 24, 1924,

lar, but payable in marks. Many life insurance policies and bonded loans [63] as well as other contracts, were so phrased. When the dollar was devalued the question arose whether the dollar-gold-mark was to be calculated on the basis of the "old" or the "new" dollar. American law was not material;[63] the clause was simply to be construed according to German law. The *Reichsgericht* held that the phrase "gold-mark" was a real gold value clause, requiring the use of the old standard of the dollar. [64] It is necessary to note, however, that the conversion into marks was made under German exchange-control, i. e., without taking into account the actual depreciation of the mark. This fact made the holding financially bearable to German debtors.

The Austrian Supreme Court decided in the same way in the case of a "dollar-gold-mark" contract made by a German (creditor) corporation with an Austrian (debtor) corporation.[65] A similar judgment was handed down by the Supreme Court of Sweden in a case involving "dollar-gold-mark" bills of exchange drawn by a German upon a Swedish firm.[66] Italian [67] and Polish[68] courts have also upheld contracts between non-American parties

§ 3(II), *ibid.* 1924 I 74; of June 27, 1924, Art. I(1b), *ibid.* 1924 I 660.

62. See Ernst Wolff, *Schuldverschreibungen auf Reichs-oder Goldmark mit unechter Valutaklausel* (1935).

63. *Infra*, p. 422.

64. Judgments of July 5, 1935, *R.G.Z.* 148, 42; Jan 31, 1936, *R.G.Z.* 150, 153 [both involving "dollar-gold-mark" life insurance]; Nov. 12, 1934, *J.W.* 1935, 189 [bonds of the *Hannoversche Provinzialverband*]; May 28, 1936, *J.W.* 1936, 2058 [bonds of the *Deutscher Sparkassen-und Giroverband*]; April 27, 1936, Bank-Archiv XXXV (1936) 442 [unbonded loan, by the *Siemens-und Halske Aktiengesellschaft* to the *Energieversorgung Gross-Dresden Aktiengesellschaft*]; Oct. 22, 1936, *R.G.Z.* 152, 166 [treasury gold bonds of 1923].

65. Judgment of May 20, 1936, 3 Ob. 178/36, cited by Plesch, *Die Goldklausel* II (1937), 114. The case of the judgment of Dec. 5, 1935, *Die Rechtsprechung* 1936, 22 is different, the "intrinsic gold value" of the loan as of the day of lending having been expressly guaranteed by the debtor. That this amounted to a real gold clause is almost beyond doubt. When, however, in 1931, an Austrian borrower of $1000 promised to pay back the loan *in Goldwährung der Vereinigten Staaten* (in gold-standard currency of the United States), this phrase was not considered a sufficiently distinct gold clause. Judgment of Feb. 23, 1937, *Die Rechtsprechung* 1937, 62.

66. Judgment of April 27, 1935, *Bull. I.I.I.* XXXIII (1935) 278. The bills referred simply to "goldmarks" but this was to be understood as "dollar-gold-mark" under the German decree of Feb. 6, 1924, *supra*, n. 61.

67. App. Milan, July 19, 1934, *R.D. Comm.* 1935 II 531 at 540.

68. Supreme Court of Poland, March 21, 1935, Plesch, *The Gold Clause* II (1936) 41 [bills of exchange calling for gold dollars].

entered into on a "gold-dollar" basis before the devaluation of the dollar, when payment was to be made in the national currency. Devaluation of the Swiss franc which occurred in 1936, was disregarded by a Belgian court in the case of a bonded loan floated earlier in the same year and couched in terms of Swiss francs of the weight and fineness of 1930.[69]

The holdings have been the same where the monetary unit devalued was the national money of the parties and the gold clause had not been abrogated by law. When the Italian lira was devalued in 1927 from 322 milligrammes of fine gold to 79 milligrammes, lower courts attempted to interpret "gold-lira" contracts in terms of the devalued "gold" lira,[70] but were reversed by the Court of Cassation.[71] "Gold-lira" clauses were thus safeguarded, but after official quotations of the gold price were discontinued by a decree of September 17, 1932,[72] the Court of Cassation concluded that the last official quotation of September 30, 1932, should be binding upon the parties and upon the courts, despite later depreciation of the lira. This meant, of course, an indirect partial invalidation of the gold-lira clauses.[73] The devaluation of the lira in 1936, on a lower level resulted in a corresponding increase from about 3.66 to 6.20 of the number of

69. App. Liége, Feb. 10, 1939, *Bull. I.I.* XL (1939) 283 [French debtor].

70. *Cf.* Cass., June 12, 1931, *Foro Italiano*, 1931 I 1415 reversing App. Naples, May 21, 1930. The erroneous theory was again advanced by the Appellate Court of Venice, July 15, 1937, *Foro delle Venezie*, 1937, 763. The question would not have arisen under the customary American gold clause indicating weight and fineness.

71. See case cited *supra*, n. 70. Other cases are listed by Ascarelli *R.D.Comm.* 1933 II 190, commenting on the 1932 judgment. See also Ascarelli, "Clausole oro e stabilizzazione della moneta", *Rivista di Diritto Internationale*, 1929, 576.

72. Decree of Sept. 17, 1932, n. 1234, *Raccolta Ufficiale* 1932 III 2371.

73. Ital. Cass. Feb. 5, 1936, *R.D. Comm.* 1936 II 386, 399. Although the decree of Jan. 10, 1918, no. 26, *Raccolta Ufficiale* 1918 I 65 (tr. into German in *Vertraglicher Schutz supra*, n. 47, at 83) prescribed conversion of gold debts into currency on the basis of the official gold quotations, it does not follow that after such quotations were discontinued, the last quotation ought to be permanent. The natural conclusion would be that the power of the court to ascertain the value of gold according to the rules of evidence was re-established. However, the doctrine criticized was not employed in the case of the *Lloyd Triestino* loan where not the "gold lira" but an international "gold franc" had been contracted for. In these cases the statutory gold value of the franc at the time of the issuance of the bonds was held controlling. Ital. Cass., two judgments of Aug. 4, 1936, *Foro Italiano*, 1936 I 1397 and *La Settimana della Cassazione*, 1937, 7; invalidity of gold clauses was called for by the decree of Oct. 5, 1936, *infra*, p. 281, n. 5.

lire equivalent to a gold lira; again, a depreciation of the lira subsequent to the devaluation decree was disregarded.[74]

All considered, there is unanimity concerning this aspect of devaluation, except for the Italian treatment of the gold lira. That proximate unanimity has an important bearing upon gold clauses in international agreements.[75]

Section 18

JUDICIAL RESTRICTION OF GOLD CLAUSES

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I. The French Rule [1]

The process of gradual deterioration of the monetary unit, by

74. Royal decree of Oct. 5, 1936, no. 1745 (tr. Federal Reserve Bulletin 1936, 881) as interpreted by App. Milan, Nov. 5, 1937, *Foro Italiano* 1938 I 648 and Tribunal Padova, Feb. 1, 1938, *Foro delle Venezie*, 1938, 304, 309.

75. *Infra*, p. 442.

1. The following list may serve as a survey of the French pertinent literature. Capitant, "Les succédanés de la clause-or", *D.H. Chronique* 1926, 33; *id.*, "Du sort du contrat contenant une clause annulée comme contraire aux lois sur le cours légal", *D.H. Chronique* 1927, 1; Champcommunal, "La stabilisation des prix dans les contrats à terme", *Annales de Droit Commercial*, 1926, 93; Demogue, "De quelques clauses tendant à se prémunir contre les variations de valeur du franc", *Journal des Notaires et des Avocats*, Feb. 20th, 1923; Gény "La validité juridique de la clause—'payable en or'", *Revue Trimestrielle de Droit Civil*, 1926, 557; *id.*, "Cours légal et cours forcé en matière de monnaie et de papier-monnaie", *ibid.* 1928, 5; Hubrecht *Stabilisation du Franc et Valorisation des Créances* (1928); Lefon, *Des Contrats d'Assurances sur la Vie Souscrits en Monnaie Etrangère ou en Francs-Or* (1929); Mestre et James, *La Clause-Or en Droit Français* (1926); Niboyet, "Des conflits de lois relatifs aux paiements, *etc.*", *Revue de Droit International Privé*, 1925, 161; Nogaro, "La clause 'payable en or'", *Revue Trimestrielle de Droit Civil*, 1925, 5; *id.* "Les principes fondamentaux du droit monétaire", *ibid.*, 1929, 949; Penciulesco, *La Monnaie de Paiement dans les Contrats Internationaux* (thesis Paris, 1937); Perroud, "La détermination de la monnaie de paiement, la clause paiement or et le problème du change", *J.D.Int.* 1924, 628; Picard, "La Clause 'paiement or' et les reglements extérieurs", *J.D.Int.* 1927, 34; Piret, *Les Variations Monétaires et leurs Répercussions en Droit Privé Belge* (Brussels, 1935) 226; Pirotte, *La Clause-Or devant la Loi et les Tribunaux* (Brussels, 1933); Rivière, "*Problème du franc-*

means of debasement, "raising the coin",[2] inflation, and other devices has nowhere been more consistent and striking than in France where from the time of Charlemagne until the Great Revolution the *livre* gradually shrank more than 98 per cent.[3] Only by force were the French kings able to impress the burden of this policy upon the people. Among the means employed by the monarchs was the prohibition of clauses used by creditors to safeguard themselves against the effects of the royal policy. As early as the 16th century [4] disapproval of such clauses was embodied in legal doctrine. At the time of John Law this doctrine was used by the *Conseil d'Etat du Roi* to declare void promises to pay in specie.[5] In the period of the assignats the legislature expressly proclaimed that "all sums stipulated as being payable in specie may be paid in assignats . . . notwithstanding any clause or disposition to the contrary." [6] A similar law was later enacted in order to enforce the circulation of the *mandats territoriaux*.[7]

These provisions were constantly applied by the courts,[8] thus creating a tradition which was revived during and after the Franco-Prussian war of 1870–71. By Act of August 12, 1870,[9] the notes of the *Banque de France* were declared legal tender, and redemption was suspended. The effect of this Act upon pre-existent gold clauses was considered by the *Cour de Cassation* in the famous case of *Do-Delattre* v. *Scouteten*.[10] The spouses Do-Delattre had promised before the war to pay their debts to

or", Revue de Droit International Privé, 1932, 1; Schkaff, *La Dépréciation Monétaire, ses Effets en Droit Privé* (1926); Seignol, *Clauses Destinées à Parer l'Instabilité Monétaire, l'Option de Change et l'Option de Place* (1935). On the comparative law aspect, see *supra*, p. 223, n. 1; on the conflict of laws aspect, see *infra*, sec. 29.

2. *Supra*, p. 38.

3. *Supra*, p. 38.

4. *Infra*, p. 267.

5. A number of these ordinances are reproduced in *Revue du Droit Bancaire* I (1922–23) 261. The use of gold and silver clauses was again permitted, after the breakdown of the John Law experiment, by an ordinance of August 15, 1720, *loc. cit.*, 264. The resulting situation was described in *Arbuthnot* v. *Read*, 24 *House of Lords Journal* 54b (H. of L., 1731–1732) [printed briefs in Columbia Law Library under "Appeal Papers, House of Lords," Vol. 1, p. 356].

6. Decree of Sept. 12/18, 1790, Duvergier, *Collection des Lois* I 416.

7. Law of 15 Germinal Year IV (April 4, 1796), Art. 2, Duvergier, *op. cit.*, IX 83; Mestre and James, *supra*, n. 1, at 67, n. 1.

8. See Dalloz, *Jurisprudence Générale* XXXV (1853) 13 "Papier monnaie"

9. *D.P.* 1870 IV 76.

10. Judgment of Feb. 11, 1873, *D.P.* 1873 I 177.

Scouteten in "gold or silver coin and not in any value or paper money made legal tender in France through laws or decrees which hereby are waived by the debtors in good faith and upon honor . . ." Although the law of 1870 did not contain the "notwithstanding-any-clause-to-the-contrary" provision, the challenging stipulation of the parties was met by the court, which held it ineffective during the existence of the *cours forcé*, that is, as long as the irredeemable bank notes should be legal tender. Consequently the debtors were allowed to discharge their debts in depreciated bank notes.

The problem arose anew during World War I when one Deschamps, a Frenchman, brought suit in Paris against the New York Life Insurance Company for the payment in gold of a "gold-franc" life insurance policy.[11] The *Cour de Cassation* held the company liable for gold francs on the ground that the *cours-forcé* laws, re-enacted during World War I [12] rested exclusively on the national interest and were not intended to prevent gold from re-entering France. The *Do-Delattre* v. *Scouteten* rule thus received a nationalistic twist which made readjustment necessary. In a suit brought by a Swiss life insurance company for recovery of a gold mortgage on Alsatian real estate the court awarded the Swiss company the gold value of the mortgage, emphasizing the fact that Basle was the place of payment. The court in this case pointed out that the *cours forcé* rule was restricted to French territory.[13] Yet the new doctrine of the court, making the place of payment decisive as to gold clause abrogation, would have led to an invalidation of gold clauses embodied in French loans to foreigners and providing for a French place of payment. In view of the tremendous national interest in this situation, Paris being the place of payment in nearly all French loans to foreign governments and enterprises, the French Minister of Justice, by circular letter, asked the *procureurs généraux* (Attorneys General at the appellate courts) to contest the "place of payment" theory.[14] Instead, he urged them to stress the question whether the finan-

11. Judgment of June 7, 1920, in *New York Life Ins. Co.* v. *Deschamps*, *J.D.Int.* 1920, 654.

12. In addition to the law of Aug. 5, 1914, rendering inconvertible banknotes legal tender, the Court referred to an Act of Feb. 12, 1916, under which trading at a premium in national coins was prohibited *D. P.* 1914 IV 88; 1916 IV 323.

13. In *Scherrer-North* v. *Banque Hypothécaire de Bâle*, Jan. 23, 1924, *J.D.Int.* 1924, 685. The "mark" amount due was converted by the Court into French francs through a calculation which procured to the creditor a little less than the full gold value. On the "territoriality" doctrine, *supra*, p. 56.

14. Release of July 18, 1926, *J.D. Int.* 1927, 236.

cial operations involved were strictly domestic or required payment from one country to another.[15] In accord with this theory, *Procureur Général* Matter (later on President of the *Cour de Cassation*) in phrases often repeated, declared that the criterion should be whether the payments contracted for would produce a movement of "flux and reflux" ("double transfer") across the frontiers.[16] The courts responded to that suggestion, which in a few cases was expressly adopted,[17] by substituting a broad rule for the place-of-payment theory, embodying, and even going beyond the "flux and reflux" idea. Said the *Cour de Cassation:* "The international character of a transaction does not necessarily depend on the domicile of the parties and on the place of payment but on its nature (*sic*) and on all the elements which may be taken into account in impressing upon the movements of the funds involved a character exceeding the scope of the national economy." [18]

Adopting the theory of the *Cour de Cassation,* the French stabilization act of June 25, 1928,[19] devaluing the franc from 322 to 65.5 milligrams of fine gold, exempted from the effects of devaluation "international payments" validly stipulated in gold francs before the promulgation of the Act. The invalidity of earlier *domestic* gold clauses was of course not remedied by the restoration of the convertibility of bank notes on the lower level. The Monetary Law of October 1, 1936,[20] further devaluing the franc to 43-49 milligrams of fine gold extended exemption to all "international payments" previously stipulated in terms of francs—regardless of whether they were gold francs or plain

15. See *D.P.* 1928 I 27; *J.D.Int.* 1931, 6.

16. *J.D.Int.* 1931, 6.

17. See, *e.g., Cass.*, July 31, 1928, and Nov. 2, 1932, *J.D.Int.* 1929, 113, *ibid.* 1933, 1197; App. Bordeaux, Jan. 28, 1936, *Sirey* 1936 II 182. The "double transfer" doctrine was also adopted in the short-lived law of Oct. 1, 1936, *infra,* n. 20, but it soon revealed its inadequacy. See Court Béthune, Dec. 23, 1936, *J.D. Int.* 1937, 761.

18. *Banque Hypothécaire Franco-Argentine,* Jan. 14, 1934, *D.P.* 1934 I 73 at 78 and 79. See also the judgments of June 3, 1930 (*Crédit Foncier Franco-Canadien*), *D.P.* 1931 I 9; July 9, 1930 (*Société du Port de Rosario*), *D.P.* 1931 I 14; Jan. 14, 1931 (*Ville de Tokyo*), *D.P.* 1931 I 18; July 7, 1931 (*Société d'Heraclée*), *J.D.Int.* 1932, 403.

19. *J.D.Int.* 1928, 1161; *D.P.* 1928 IV 313, 317.

20. *D.P.* 1936 IV 393. See Capitant, *D.H. Chronique* 1936, 37; Mestre, *Gazette du Palais,* Oct. 15, 1936; *Z.A.I.P.* 1936, 668; Baron Nolde, "Les conséquences internationales de la loi monétaire française du 1er Octobre, 1936," *Revue Critique de Droit International,* 1937, 26; Löbl, "Der Einfluss des französischen Währungsgesetzes," *Oesterreichische Zeitschrift für Bankwesen,* 1936, 185.

"francs." Those payments were to be made on the parity existing at the time of contracting.[21] This amounted to a radical "revaluation" of international—and only of international—franc debts, leaving their definition to the discretion of the French courts. French creditors were expected to profit considerably from this measure; [22] not many French private debtors, it seemed, were affected by this extraordinary law. The legislature, in its enthusiasm for the international-payment theory, had, however, entirely overlooked the fact that the French government had guaranteed a number of franc loans of allied foreign governments, as for instance, an 8% five-year loan of Czecho-Slovakia of 600 million francs, issued in 1932 and due in 1937. The French government was bound by the law of October 1, 1936, to pay the gold value, but the Czecho-Slovakian government and other foreign principal debtors were not. Moreover, in cases involving French creditors, foreign courts would probably have disregarded the enactment. The situation was utterly embarrassing. Upon the urgent advice of the government,[23] the revaluation feature of the 1936 law was repealed, with retroactive effect, by a law of February 18, 1937.[24] In respect to gold clauses, the old rule, as confirmed by the law of 1928, remained in force.[25]

In addition to the doctrine of "international payments" which is also called the doctrine of "international contracts" the French law has another distinctive feature. Starting from the proposition that within French territory no private stipulation can prevail over the *cours forcé* of French bank notes, not only gold clauses, including gold value clauses,[26] but stipulations for payment in foreign money ("foreign-currency clauses") [27] or in

21. Act cited in preceding note, § 6.

22. This viewpoint, generally emphasized in the parliamentary debates, was stressed by Senator Dumont, chairman of the Committee on Gold Clauses, who estimated the amount of franc debts floated without gold clause in France since 1928 as three billion francs. *Journal Officiel*, Oct. 1, 1936, p. 1425.

23. Speech of the Minister of Finance, M. Auriol, before the Chamber of Deputies on February 9, 1937, *Journal Officiel*, Feb. 10, 1937, p. 408.

24. *D.P.* 1937 IV 65. See Baron Nolde "Les lois monétaires de 1937, et le droit international privé". *Revue Critique de Droit International* 1937, 443 and Niboyet in *Gazette du Palais*, March 1, 1937. Revaluation of an "international" franc loan was therefore denied by Trib. civ. Seine, March 22, 1939, *Bull. I.I.* XLI (1939) 87.

25. App. Lyon, Oct. 31, 1938, *D.H.* 1938, 604.

26. App. Paris, Feb. 22, 1924, *J.D. Int.* 1924, 702.

27. Cass., March 10, 1942, *Revue Critique de Droit International* 1946, 98; May 17, 1927, *D.P.* 1928 I 25; March 27, 1929, *D.H.* 1929, 217; Nov. 2, 1932, *D.H.* 1932, 571; April 29, 1933, *D.H.* 1933, 333 (Moroccan

francs measured by foreign currency ("foreign-currency-value clauses," "exchange-guaranty-clauses," *clauses de garantie de change*) were denied legal effect.[28] Nor were the parties allowed to stipulate in terms of coupons of the French Government's loan of 1925 which was issued on a sterling basis.[29] Only references to commodity values and to indices were held valid.[30]

II. Critique of the French Rule

The origin of the French doctrine has sometimes been sought in the subservience of French courts and legal writers to the desires and commands of the royal *fauxmonnayeurs*. This, however, is an oversimplification. It was the great Molinaeus (1500-1566) who, with perfect lucidity, first advanced the doctrine [31] that the sovereign's determinations of weight, alloy and nominal value [32] cannot be impaired by agreements of private individuals. Molinaeus qualified this statement by exempting periods of complete monetary confusion creating common disrespect for existing monetary laws.[33] He also started from a "society theory" of money, presupposing a money accepted by the community. However, once money has become an accepted instrumentality of social intercourse, each member of the community, in Molinaeus' opinion, is bound to receive it and has to suffer the consequences of its breakdown. The experiences of our generation give point to Molinaeus' pronouncements. "Just as when a public disaster occurs, it must be forborne by everybody and one citizen must not reproach nor cast the burden on another, so litigation (*débat*) on

case); Court Monaco, April 22, 1939, *J.D.Int.* 1939, 772. On the qualifications of this rule see *infra*, sec. 24 III.

28. Cass. May 17, 1927, *D.P.* 1928 I 25; Dec. 31, 1928, *D.H.* 1929, 33 [gold-dollar-value clause]; Dec. 22, 1930, *D.H.* 1931, 33; App. Paris, March 23, 1927, *Gazette du Palais*, 1927 I 707; App. Lyon, July 23, 1928, *Revue du Droit Bancaire*, 1929, 260.

App. Douai, March 16, 1936, *Gazette du Palais*, 1936 II Index 118, n. 27, is different. A promise to sell, given on a sterling basis, was, through interpretation, held ineffective after England had abandoned the gold standard. That solution would seem acceptable regardless of any general doctrine.

29. Court Rouen, March 28, 1927, *Gazette du Palais* 1927 II 90; Trib. civ. Seine, Jan. 21, 1928, *Revue du Droit Bancaire* 1928, 463; Court Belfort, March 10, 1926, *D.H.* 1926, 373. On the 1925 loan see Mestre and James, *supra*, n. 1, at 159.

30. See *infra*, sec. 20.

31. Molinaeus, *Sommaire des Contrats* (1658 ed.), no. 293.

32. Molinaeus says *cours;* in Latin he ordinarily speaks of *valor impositus*. This refers to the rating by the sovereign or other potentate of the various coins, a point misunderstood by Stampe, *supra*, p. 217, n. 67.

33. Molinaeus, *Tractatus Commerciorum*, n. 818. In the "*Sommaire*" he refers to this qualification.

monetary mutations is not permissible among them." It is certainly remarkable that independently of French theory, American and English courts should at times have applied a similar doctrine.[34]

And yet it cannot validly be contended that abrogation of gold clauses and of other protective clauses is a necessary corollary of the *cours forcé*. The fact that during the greenback period *cours forcé* co-existed with gold clauses without serious disturbances,[35] furnishes evidence to the contrary. Abrogation of gold clauses is an independent feature of an anti-inflationary policy. It is for the legislature, to decide whether or not this step should be taken because, as in the case of revaluation, it involves numerous considerations beyond a court's competence. For instance, the legislature may see fit to abrogate the clause in certain contracts and maintain it in others.[36] Judicial rule is not only too abrupt; it is also too sweeping.

Still less can the French rule be followed as to "international payments" or "international contracts." A post-war invention,[37] it is derived from the allegedly "territorial" effects of the *cours forcé*. The 20-franc note of the Banque de France, so runs the argument, must be accepted *within* France, by each creditor as the equivalent of a 20-franc gold coin. Therefore, *within* France, gold clauses are made ineffective by the *cours forcé*. *Outside* France, it is alleged, the effectiveness of gold clauses remains unimpaired.

However, as was seen,[38] the *cours forcé* is not "territorial". In fact, after France had abandoned the gold standard the Banque de France never considered, nor did any French court or writer expect that foreign holders of French bank notes would be paid gold coin of the face amount, or their equivalent in currency. Nor is there any indication that French legal tender notes, or any other legal tender notes, were refused by foreign creditors of the respective currencies because of an alleged "territoriality" of legal tender rules. The foreign effect of irredeemability in itself is sufficient to explode the international-contract theory as

34. *Infra*, p. 274.

35. *Infra*, sec. 42 I.

36. *Infra*, p. 293.

37. It was still unknown in the period following the Franco-Prussian War, App. Aix, Nov. 23, 1871, *D.P.* 1872 II 51 [gold clause undertaken by the French acceptor of a bill of exchange on behalf of a foreign maker; held invalid]. Contrary to the claim of Procureur Général Matter *(D.P.*1931 I 12), the vague discussion of Valéry, *Manuel de Droit International Privé* (1914) 1000, 1001, cannot be said to be an authority for Mr. Matter's theory.

38. *Supra*, p. 56.

far as gold clauses are concerned. Were irredeemability destructive of gold clauses at all, it would then invalidate all gold clauses, domestic and international.

The fact that the *cours forcé,* as such, is by no means incompatible with judicial protection of gold clauses, has been shown from comparative legal history. The compatibility of the two rules is particularly manifest in the case of gold *value* clauses. Admitting for the sake of argument that gold coin clauses run counter to the *cours forcé* this proposition would not hold good with respect to gold value clauses. The gold value creditor, by demanding, *in currency,* a sum in excess of the nominal amount of the debt, is willing to receive the irredeemable paper money at its full nominal value. The efficacy of gold *value* clauses, however, is what really matters from a practical point of view.[39] In this respect, too, the territoriality doctrine fails.

Occasionally another explanation of the French theory has been advanced. An "international contract" it has been said, is not subjected to the power of a national legislature.[40] This again is a specious argument. The Mixed Appellate Court of Alexandria, formerly a faithful follower of French doctrine, rejected the international-contract theory vigorously in 1936, pointing out that a genuine "international contract" is a contract between sovereign powers on matters of public law whereas the contracts in question are private in nature and necessarily subject to municipal legislation.[41] The same view has been taken by the Supreme Court of Sweden,[42] and rightly so. The contracts in question are governed by their applicable national laws, French or others, each country being free to maintain or restrict them as it pleases.[43]

39. See *supra,* p. 248. Gold value clauses are ineffective under French law, *supra,* n. 266.

40. This notion appears, *e.g.,* in Mixed App. Alexandria, June 13 (18?), 1934, *Journal des Tribunaux Mixtes* of June 22/23, 1934, *J.D.Int.* 1934, 1008; it is stated also by Prof. Niboyet in *Gazette du Palais* of March 1, 1937, no. 59.

41. Judgments of Feb. 18, 1936, *D.P.* 1936 II 78. See also *infra,* n. 53.

42. Jan. 30, 1937, in *Scandia Ins. Co., Ltd.* v. *The Swedish National Debt Office, Bull. I.I.* XXXVI (1937), 327; English translation in *Guldklausulmålet* III (Stockholm, 1937) 133, 147. See also *Reichsgericht,* May 28, 1936, *J.W.* 1936, 2058.

43. *Infra,* sec. 30 IV. The French doctrine has been defended by Domke in *Mélanges Streit* I (Athens 1939) 225 and Journ. Comp. Legisl. & Int. Law, 3d Ser. XXIV (1942) 54, on the ground that the necessity of protecting the domestic currency does not warrant impairment of the rule *pacta sunt servanda,* so important in international commerce. Still, protection of the national currency, a purely political principle, would require, even in the first place, *impairment* of international payments where the country is on the debtor side, see

Besides suffering from lack of legal foundation, the international-contract doctrine is objectionable as being arbitrary. A transaction is often "international" only in part. Bonds—"international" because issued by an Argentine corporation and floated through French banks—may have been subscribed to a considerable extent by Argentine or other non-French capitalists, whose payments never crossed the French frontier. Or the Argentine issuer may have used the proceeds of the French loan in France. These financial interests and movements are ordinarily not discernible without the closest knowledge of the internal affairs of the debtor. They are certainly entirely outside the field of legal contemplation. The French courts, moreover, have enveloped their distinction in a haze. In the case of *Schwerdt* v. *Mumm,* the spouses Schwerdt had, in 1912 at Frankfurt am Main, made a loan of 2,500,000 francs "payable in Reims or Paris in current gold francs" to the famous champagne firm of Mumm & Cie of Reims, the partners of which were German nationals. After the war, the creditors brought suit for gold payment against the French receivers of the firm, the assets of which had been seized by the French government under the Treaty of Versailles. The *Cour de Cassation* held the clause void because a share in the partnership of Mumm & Cie was, as early as 1912, held by the creditors and then transformed into the loan. On this basis the court concluded that there had been no exchange of funds between the two countries.[44] Similarly in the case of the *Société des Music Halls Parisiens* v. *Société Victoria Palace* where an English company had subscribed 250,000 francs of a bond loan of a French company, redemption to be made by a payment of £10,000, this clause was declared void because the English company at the time of the subscription, had been a creditor of the French company and had used its credit to discharge the subscription price.[45] The English creditor had, however, previously transferred its money to France, as had the

infra, p. 277. In fact, the more recent French doctrine is built upon a *legal* principle, criticized above, namely, the alleged "territoriality" of currency laws. See also *infra,* n. 57.

44. Judgment of July 31, 1928, *J.D. Int.* 1929, 113; same solution in like case, with another creditor, App.Paris, April 16, 1926, *J.D.Int.* 1926, 972. No less challenging was Cass., Feb. 14, 1938, *Revue Pratique de Droit International Privé* 1938, 481 in *Comptoir d'Escompte de Genève et Banque d'Escompte Suisse* v. *Soc. des Papeteries de France,* where in a patently "international" loan the Swiss creditors lost their *clause de garantie de change* because the loan was declared a French "domestic" one.

45. Judgment of Nov. 2, 1932, *J.D. Int.* 1933, 1197, with judicious annotation by Professor Perroud.

spouses Schwerdt in the first case, and retransfer to their country was intended by the contract. The court interpolated a legalistic argument into a financial conception. The decisions in such cases obviously will vary as one turns to the economic or to the legalistic aspect of the situation.[46] The final formula of the *Cour de Cassation* quoted earlier[47] does away altogether with the last remnant of legal certainty.

Ironically the French doctrine has sometimes been misused against France. In 1901 the Congo State raised a loan in Belgium and France. The individual bonds were made payable in gold francs in Brussels and in Paris. When a case involving these bonds arose, the Belgian Courts referred to the French doctrine. Asserting that there was *no* international contract *(sic)*, they held the gold clause void. That the bonds were payable in Paris was deemed irrelevant. The judgments do not even mention the fact that the loan had been admitted to quotation on the Paris Bourse as well as the Brussels Bourse.[48] When the French creditors brought suit in the French courts against the Belgian State, successor to the Congo State, they lost their case because the Belgian Government pleaded its immunity from jurisdiction.[49]

On the whole, however, the French doctrine has greatly served French national interests so strongly emphasized in *Deschamps* v. *New York Life Insurance Co.* During a period of thirty years before World War I, foreign loans amounting to forty billion francs were floated in France. A considerable part, if not the majority of these contained gold clauses.[50] Such clauses were probably used to a still greater extent in French post-war loans

46. Likewise, when English investors in Algerian real estate made contracts with their tenants calling for payment of pounds in London or Algiers, this stipulation was held void by *Cass.*, May 17, 1927, *J.D. Int.* 1928, 419, and March 27, 1929, *D.H.* 1929, 217. *Contra:* Perroud, *J.D.Int.* 1928, 421; Esmein, *Sirey*, 1927 I 289; Court Angers, Feb. 13, 1928, *J.D.Int.* 1929, 103.

47. *Supra*, p. 265.

48. Belgian *Cass.*, April 27, 1933, *J. D.Int.* 1933, 739; App.Brussels, Oct. 2, 1930, *ibid.*, 1931, 213.

49. *Le Temps*, Oct. 16 and Nov. 22, 1933.

50. "Rapport Annuel de la Commission des Emprunts-or (Art. 18 de la Loi du 23 décembre 1933)", *Journal Officiel*, Jan. 17, 1936, p. 61. The Report contains a complete list of the foreign bond loans floated in France and makes graphic the tremendous amount of litigation regarding the gold clauses and other protective clauses attached to these loans. As to the losses sustained by French bondholders and by the French Treasury, see the speech of Deputy Boucher in the Chamber of Deputies, *Journal Officiel*, "Débats Parlementaires", 1936, no. 82, p. 2806.

to foreign debtors.[51] True, there are a few cases of gold clauses undertaken by French debtors particularly in American post-war loans, but weighed against French creditors' gold-clauses, the liabilities side is negligible. The fight for the maintenance of the contractual stipulations was conducted in France with remarkable frankness under the slogan of "protection of French savings" *(épargne)*. This motive found its most striking expression in 1936 when the astounding legislative attempt was made to extend the maintenance of the orginal parity to "international" contracts with no gold clauses. It is worth noting that André Mater in his *Traité Juridique de la Monnaie et du Change* interprets the French cases to mean that abrogation of gold clauses through the institution of *cours forcé*, operates only in favor of French debtors, but does not give relief to foreign debtors of French creditors.[52]

By exempting "international" contracts from gold clause abrogation the French courts have accomplished legally what the French legislature would have found embarrassing to do politically. The result stands in contrast to the American legislation of 1933 which, at heavy sacrifice to American creditors, granted relief to American and foreign debtors alike.[53] No less regrettable was the course of French courts in the application of the rule once adopted. Not only were foreign creditors, by rather tenuous arguments, denied the benefit of the international-contract theory[54] but puzzling pretexts were advanced to protect

51. They are listed by Scroggs, "Foreign treatment of American creditors," 14 *Foreign Affairs* 345 (1936), but not in the Report cited in the preceding note.

52. *Op. cit.* (1925) 192.

53. *Infra*, p. 433. Mixed App.Alexandria, March 31, 1938, *Bull.I.I.I.* XXXIX (1938) 352, 359, rejecting the international-contract doctrine, terms it rightly a device adapted to the economic needs of creditor countries.

54. *Supra*, p. 270.

Instances of foreign debtors claiming their contract to be "domestic" in the French sense are rare, of course. In some cases foreign insurance companies, obligated in gold on behalf of French policy holders, were granted the benefit of the abrogation of the gold clause: *Cass.*, June 30, 1931, *D.P.* 1931 I 140 at 144; Aug. 1, 1932, *Gazette du Palais* 1932, II 721; App.Paris, Dec. 31, 1926, *J.D.Int.* 1927, 104. But French practice can scarcely be given credit for these decisions, since the contracts were made by the companies' French branches which had been put under French regulation and control, by a statute of March 17, 1905, in order to "frenchify" their business; *Cass.*, June 30, 1931, *supra*, and Trib. civ. Seine, April 13, 1929, *J.D.Int.* 1929, 1316. Since by virtue of French law the French branches were deprived of the benefits of the gold clauses with regard to their French investments, they were, as quasi-French enterprises, to be protected

French debtors from foreign creditors [55] and thereby to cut down the liabilities side of the French balance. In the case of French creditors, however, the range of gold clauses was unjustifiably broadened.[56] In the troublesome inter-war period, there was no other jurisdiction which so closely followed the line of national financial interest. It is comforting to note that French legal science on the whole has not participated in these quasi-patriotic efforts. On the contrary, many of the fallacies of the courts were exposed by French writers, and the basic doctrines of the French courts frequently confuted by leading French jurists.[57]

The breakdown of the official French doctrine was brought about by the failure of the law of 1936. Because of the fact that this enactment was a consistent conclusion from the international-payment doctrine, its failure amounted to a *reductio ad absurdum* of that doctrine. The latter was then practically abandoned by the French Government and the French corporations. Relying on the American Joint Resolution of 1933, they discontinued gold payments on their American loans,[58] contrary to the

accordingly against the gold claims of the policy holders, even on a French nationalistic viewpoint. Only in the very unusual circumstances surrounding the judgment of App. Paris of Dec. 19, 1936, *Revue Générale des Assurances Terrestres*, 1937, 504, did the doctrine of the French courts prove comparatively unfavorable to a "frenchified" company. In this case a pre-war insurance had been taken out in German marks which subsequently depreciated to zero. Owing to the invalidity of the mark-stipulation the insured eventually obtained depreciated French francs rather than nothing at all.

55. *Supra*, n. 11; p. 242, n. 21; *infra*, n. 91; sec. 26, n. 26; and, generally, sec. 27 III.

56. See *supra*, p. 237.
Both the *Société du Port de Rosario* and the *Banque Hypothécaire Franco-Argentine*, *supra*, n. 18, though set up under French law, were treated like foreigners as explicitly stated, in the *Rosario* case, by *Procureur Général* Matter, *D.P.* 1931 I 17.

57. Mestre and James *La Clause-Or en Droit Français* (1926); Gény, *Revue Trimestrielle de Droit Civil*, 1926, 557; *ibid.* 1928, 5; Rivière [President of App. Caen] *Revue de Droit International Privé*, 1932, 1; Planiol and Ripert, *Traité Élémentaire de Droit Civil* II (11th ed., 1935) no. 424; Champcommunal in *Annales de Droit Commercial* 1926, 93. All of these considered gold and other protective clauses as not affected by *cours forcé*. Nogaro, an economist, belongs to the few leading French writers to vindicate the distinction between "international" and other contracts. *Revue Trimestrielle de Droit Civil* 1925, 5. *Contra:* Mestre and James, *op. cit.*; Perras, *La Monnaie de Paiement et les Emprunts Extérieurs* (1932) 230; and Batiffol, *Les Conflits de Lois en Matière de Contrats* (1938) 446, 447.

58. Notice thereof was given in 1937 in the New York newspapers. Up to that time, payments on French loans had been made at gold value.

international-contract theory. The government, upon an action by a French bondholder, availed itself of its sovereign immunity.[59] Nevertheless, the old doctrine has been employed against foreign debtors by French courts, subsequent to the default of the American loans, and regardless of the further decline of the world's currencies.[60] Still the debtors are now widely protected by way of exchange control.[61]

III. The Attitude of The Non-French Jurisdictions

Regarding non-French jurisdictions, certain common law courts, without any connection with the French doctrine, have held that gold clauses lose their efficacy as soon as inconvertible notes become legal tender. In the greenback period, this was the view of the great majority of American State courts [62] before the Supreme Court in *Bronson* v. *Rodes* [63] reached the opposite conclusion. On a like theory the English Court of Appeal, in *Feist* v. *Société Intercommunale Belge d'Electricité* condemned the gold clause,[64] but was reversed by the House of Lords.[65] It

59. In the case of an American bonded gold loan to the French Government, App. Paris, July 20, 1938, *J.D. Int.* 1939, 104, reversing Trib. civ. Seine, May 5, 1937, *Gazette du Palais* 1937 I 925, on highly questionable grounds (see Note, *J.D.Int.* 1939, 105), disclaimed jurisdiction of the ordinary law courts in this matter. The French Government had also invoked the Joint Resolution. Furthermore, the Canadian loan of the "Messageries Maritimes," which had invoked the Canadian abrogation of their gold clauses, *supra*, p. 237, n. 1, was guaranteed by the French Government. Prof. Jèze, *Journal des Finances* of Nov. 25, 1938, declares it "immensely regrettable" that the French Government had "incited" the debtor company to raise that defense.

By decree of June 28, 1937, all gold clauses were suspended, but the suspension lasted only three days. *Dalloz, Bulletin Législatif* 1937, 537.

60. Cass., July 19, 1937, *D.H.* 1937, 567 (dictum); App. Paris, April 24, 1940, *Revue Critique de Droit International* 1946, 79; Trib. civ. Seine, March 24, 1937, *J.D.Int.* 1938, 75.

61. *Infra*, sec. 31.

62. *Wood* v. *Bullens*, 6 Allen (88 Mass.) 516 (1863); *Howe* v. *Nickerson*, 14 Allen (96 Mass.) 400 (1867); *Rodes* v. *Bronson*, 34 N.Y. 649 (1866), and other cases collected by Dawson, "The Gold Clause Decisions", 33 *Mich L.R.* 674 n. 54 (1935) among them *Brown* v. *Welch*, 26 Ind. 116 (1866), and *Jones* v. *Smith*, 48 Barb. (N.Y.) 552 (1867) [referring to gold value clauses]. Only in California did favor of gold prevail. *Carpenthier* v. *Atherton*, 25 Cal. 564 (1864).

63. 7 Wall. (74 U.S.) 229, 19 L.Ed. 141 (1868), *supra*, p. 252, n. 21; *infra*, p. 592.

64. [1933] 1 Ch. 684 at 696 (C.A., 1933).

65. [1934] A.C. 161 (H. of L., 1933). The High Court of Australia, in *Jolley* v. *Mainka*, 49 C.L.R. 242 (1933), a case from the mandated part of New Guinea, followed the

may also be noted that before the enactment of the Joint Resolution of June 5, 1933 abrogating the gold clauses, it was contended by the Senate Committee on Banking and Currency that gold clauses were invalid.[66] The Committee's view was based on the "Thomas Amendment" of May 12, 1933 to the Agricultural Adjustment Act,[67] which rendered all American currency legal tender. There is also some judicial authority to the same effect.[68]

On the whole, however, the law is settled that *cours forcé,* in itself, does not impair gold clauses. In the early history of the United States gold and silver protective clauses were uniformly deemed valid.[69] Gold clauses have more recently been upheld in the face of laws making paper money legal tender not only by the Supreme Court of the United States and the House of Lords, but also by the highest courts of Argentina,[70] Austria,[71] Denmark,[72] Finland,[73] Italy,[74] Czecho-Slovakia,[75] and other courts.[76] When

Court of Appeal, then not yet reversed.

66. Sen. Rep. no. 99, 73d Cong., 1st Sess.

67. 48 Stat. 52, as amended June 5, 1938, 48 Stat. 113, 31 U.S.C. 462.

68. See *Compañia de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland,* 269 N.Y. 22, 198 N.E. 671 (1935) ["The Joint Resolution merely stated more specifically that which had already been enacted under the Agricultural Act (May, 1933)"]. See also *Irving Trust Co.* v. *Hazlewood,* 148 Misc. 456, 265 N.Y. Supp. 57 (1933).

69. Hargreaves, *Restoring Currency Standards* (1926) 11. In *Hollingsworth* v. *Ogle,* 1 Dall. 257 (Pa., 1788), the court said of the year 1779 ". . . nor was it then customary to lend merely for the interest: but a practice had prevailed of making bonds payable in dollars, or for bills of exchange payable in France [francs] *(sic)."* In Pennsylvania gold and other protective clauses were expressly upheld by a statute of June 21, 1781, § 5, 1 Dallas, *Laws of Pennsylvania* 902.

70. Judgment of Sept. 29, 1941, *Revista de Jurisprudencia Argentina* LXXVI 389. See also *supra,* p. 247.

71. Opinion of the Great Senate *(Plenarbeschluss)* of Nov. 26, 1935, regarding the American bonds of the Austrian League-of-Nations Loan and the International Federal Loan, 1930, in *J.D.Int.* 1936, 442, 717; Judgment of June 1, 1937, *Bull. I.I.I.* XXXVII (1937), 245 (regarding the bonds of the Lloyd Triestino). For a discussion of the 1935 opinion, see Plesch and Domke, *Die Oesterreichische Völkerbundsanleihe* (Zürich, 1936).

72. June 21 and Oct. 6, 1933, *Ugeskrift for Retsvaesen,* 1933, p. 703, 1028; *Z.A.I.P.* 1933, pp. 960, 962; see also Ussing, "Guldklausuler", *Ugeskrift for Retsvaesen,* 1933, p. 264.

73. Jan. 18, 1933, *Z.A.I.P.* 1933, 467.

74. Ital. Cass., judgments of June 12, 1931, *Foro Italiano,* 1931 I 1415; April 18, 1932, *ibid.,* 1933 I 193 (gold coin clauses); May 20, 1932, *Settimana della Cassazione,* 1932, 1071 (gold value clause). After the devaluation of 1936, the same theory

75. See note 75 on next page.

76. See note 76 on next page.

in the case of the Serbian and Brazilian laws, the Permanent Court of International Justice employed the international-contract concept, it did so only because it held French law applicable [77]—a line of reasoning which has sometimes been grossly misinterpreted.[78] Belgian courts, while holding gold coin clauses invalid under *cours forcé*,[79] recognized the validity of gold value clauses and similar guaranty clauses.[80] Consequently the conception of "international contracts" though occasionally referred to in a Belgian case,[81] had practically no relevance in the Belgian situation.[82] Belgian jurisprudence, therefore, can definitely be

was used by the App. Milan, Nov. 5, 1937, *Foro Italiano*, 1938 I 648 and Nov. 26, 1937 *ibid.*, 273, [also *J.D.Int.* 1939, 181]. During the 1870's the decisions went the other way because of a different statutory set-up. *Infra*, p. 293, n. 55. Judicial restriction of gold clauses in Italy was based on a different theory, *supra*, p. 73 at n. 261.

Among Italian publications on gold clauses there may be mentioned Ascarelli, *Rivista di Diritto Internazionale* 1929, 576; Mossa, *R.D. Comm.* 1933 II 190; Bresch, *Foro delle Venezie* 1934, 796; Greco, *R. D.Comm.* 1935 II 532; Grassetti, *R. D.Comm.* 1936 II 387. See also *infra*, p. 281, n. 5.

75. Judgment of March 7, 1922, quoted by Sedlaček in *Zeitschrift für Ostrecht* 1927, 346 at 348; of March 10, 1927, *ibid.*, 1929, 1364. A judgment of Jan. 22, 1936, summarized in *Z.A.I.P.* 1937, 278, construed the devaluation law of 1934 by which the old Czechoslovakian crown was replaced "in all legal relationships" by the devalued crown, as abrogating gold clauses. Because of a subsequent and contrary official comment, the court changed its attitude and again recognized gold clauses. Judgments of Dec. 10, 1936, *Prager Archiv* 1937, 1067; June 11, 1937, *ibid.*, 1937, 2088.

76. App. Leeuwarden, Nov. 21, 1934, *Nederlandsche Jurisprudentie*, 1935, 333; App. Geneva, Jan. 22, 1937, *Bull. I.I.I.* XXXVI (1937), 114.

77. *J.D.Int.* 1929, 977 at 1007.

78. *Infra*, p. 290, n. 42.

79. Belg. Cass., June 12, 1930, *Pasicrisie Belge* 1930 I 245.

80. Belg. Cass., May 30, 1929, *Pasicrisie Belge* 1929 I 206; May 12, 1932, *ibid.* 1932 I 167. Numerous similar decisions of lower courts are listed by Piret, *supra*, n. 1, at 238, 245. More recently a gold value clause was upheld by App. Brussels, Feb. 10, 1937, *Pasicrisie Belge* 1937 II 154.

81. *Supra*, p. 271. The reference was presumably made in order to show that the adjudication would be the same under the French doctrine.

82. Piret, *loc. cit.*, 249. Lower courts have sometimes taken a different view. Thus, a judgment of the Court Antwerp, Jan. 5, 1935, *Bull. I.I.I.* XXXII (1935) 93, involving the American loan of the City of Antwerp, 1923, rejected recognition of American gold clause abrogation in terms of French theory. Sauser-Hall, "La clause-or dans les contrats publics et privés" *Rec. Ac.* (1937) 711, mentions that Belgium had adopted during a certain period the French distinction between domestic and international contracts, but this statement is not in harmony with the law as

listed as opposed to French doctrine, a fact of great significance considering the traditional reliance of Belgian courts on French theory and practice. For a similar reason it is noteworthy that the Egyptian Mixed Courts vigorously rejected the French doctrine.[83] An Egyptian decree of 1935, characteristically reversing the French idea, ordained invalidation of *international* payments,[84] and the same was done in 1936 by Germany [85] because the debtors were practically always Egyptian or German debtors, respectively.[86] Thus, a debtor country utilized the "international contract" theory as a weapon against its foreign creditors; the creditor country as a weapon against its foreign debtors. All considered, the French doctrine on protective clauses has failed outside France.[87] It should be mentioned, however, that the term "international contract" is sometimes used without relation to the French theory,[88] meaning a contract having contacts with

reflected by the decisions of the Belgian *Cour de Cassation.*

83. Mixed App. Alexandria, *supra*, n. 53, and other cases listed in Reiss, *Portée Internationale des Lois Interdisant la Clause-Or* (1936) 68.

84. *J.D.Int.* 1935, 1103, 1106.

85. Law of June 26, 1936, *R.G. Bl.* 1936 I 515, and decree of Dec. 5, 1936, *ibid.* 1010, commented on in *Z.A.I.P.* 1936, 391, and by Domke, "La législation allemande etc.," *Bull. I.I.I.* XXXVI (1937), 189, with further references. [The 1936 law is translated into English in Foreign Bondholders Committee, *Annual Report*, 1937, 421.] The official commentary (*J.W.* 1936, 2020) explains that maintenance of gold clauses is incompatible with devaluation (rather than with *cours forcé*), but for obscure reasons this statement is limited to *international* finance.

86. A tendency to maintain gold clauses in domestic rather than in international relationships developed also in Italian law, Court Bologna, June 30, 1937, *Foro Italiano*, 1937 I 1502, 1503. On the other hand, App. Rome, July 15, 1938, *Giurisprudenza Italiana* XCI (1939). I(2) 68, more nearly approaches the French conception.

87. An exception, perhaps, was Roumania, Peniulesco, *La Monnaie de Paiements dans les Contrats Internationaux* (thesis Paris, 1937) 292. Of the two Danish decisions *supra*, n. 72, the first argued in terms of international contracts, but the latter upheld the gold clause in a purely domestic situation. A lawgiver may choose to suppress gold clauses primarily in internal relations. This was done by the Dutch law of May 24, 1937, *infra*, p. 281, n. 5; p. 440.

88. The Swiss Federal Court, judgment of May 23, 1928, *Amtliche Sammlung* 54 II 257; *J.D.Int.* 1929, 497 [regarding bonds of the *Crédit Foncier Franco-Canadien*], described bonds floated in foreign markets (*"en mains d'un public international de créanciers"*) as *"titres internationaux,"* adding, however, that the term was no concept of Swiss law or finance. Elsewhere the court called the idea "fluid," judgment of Feb. 11, 1931, *Amtliche Sammlung* 57 II 69, *J.D. Int.* 1931, 510, in re bonds of the Heraclea Company. Similarly, the *Hooge Raad* in the *Royal Dutch* case, *infra*, sec. 29, n. 64, spoke of the "in-

more than one country. In this application the term has little value for juridical analysis.

IV. Various Judicial Restrictions of Gold Clauses

In addition to the French *cours forcé* rule, and to the Tantalus interpretation, the inventive genius of the courts has fashioned still other instruments to eliminate unwelcome gold clauses. We have seen how distinct and unequivocal promises to pay gold have been nullified as sham gold clauses [89] and how the Italian Court of Cassation curtailed the clauses by way of a devaluation theory.[90] A French Appellate Court went even further, when in the case of a mortgage on Alsatian real estate it admitted that the contract contained a gold clause, but held it irrelevant as merely "a formula of drafting and pure routine" *(formule de rédaction et de pur style)*.[91] The imagination is staggered by results which would ensue upon the general disregard of "routine" clauses in mortgage or corporate deeds. And there are more examples of this sort.[92] Indeed, the whole attitude of the various judiciaries in this matter is rather discouraging.

In conclusion, defenses of a different character used against gold clauses may be listed briefly. In periods of depreciation shrewd money lenders will sometimes grant loans upon the condition that the depreciated paper money lent shall be restored in gold of the same nominal value or in currency equal to this gold value. Whether such contracts are or are not usurious will depend to a great extent on the degree of depreciation existing at the time of the loan.[93] More interesting is a ruling of the Ger-

ternational character" of the loan in a nontechnical sense.

89. *Supra*, p. 245.

90. *Supra*, p. 261.

91. Tribunal Supérieur Colmar, Nov. 20, 1921, *Revue Juridique d'Alsace et de Lorraine* 1922, 97 [Alsatian plaintiff who, after the armistice, had acquired the mortgage from a German mortgagee]. The same surprising theory in Trib. civ. Seine, April 6, 1927, *D.H.* 1927, 296. *Contra: In re Missouri Pac. R. Co.*, 7 F.Supp. 1 (D. Mo., 1934) [recognizing a gold clause while at the same time emphasizing its routine character.]

92. The Court of Oslo, Dec. 12, 1934, *Z.A.I.P.* 1936, 633, brushed aside an express gold clause on the ground that it was not perceived by the debtor. The refusal by the Tribunal Vaud, *supra*, p. 255, n. 43, to give judgment on a gold value clause is likewise in point as there was in Switzerland little difficulty in ascertaining the value of gold.

Finally a case from French revolutionary times may be referred to. It did not bear on a gold clause, but on a similar protective clause ("*600 francs valeur fixe*"). Cass., 17 Frimaire Year VII, *Sirey* I 140, discarded the clause because it was not "express" enough.

93. Loans made in depreciated greenbacks to be discharged in gold

man Cartel Court which was created after World War I in order to remedy abuses resulting from industrial combinations. In 1931 certain German manufacturers had agreed to sell their products only on a "gold-mark" basis. Such an agreement was not then unlawful in itself, but the Association of German Department-Stores opposed it and resolved to boycott the manufacturers until they abandoned "gold-mark" pricing. On a suit brought by the manufacturers the Cartel Court held that the boycott did not unreasonably impair the economic freedom of the manufacturers, since the general use of gold clauses might be expected to provoke and spread distrust in the German currency.[94]

Exchange control does not affect the legal substance of gold clauses;[95] the protection it grants to gold clause debtors, is indirect only.

dollars of the same nominal amount generally have been held usurious. *Tyng* v. *Commercial Warehouse Co.*, 58 N.Y. 308 (1874). Cf. *Stark & Wales* v. *Coffin*, 105 Mass. 328 (1870). The cases are collected in *American Digest, Century Ed.*, "Usury," secs. 35 and 45. In a more recent federal case [*In re Mansfield Steel Corporation*, 30 F.2d 832 (D. Mich., 1929)], a loan was given in Canadian dollars then at a discount, to be repaid in United States dollars (a hidden gold clause). Held: no usury, though the maximum interest rate was charged. In analogous cases App. Milan, July 19, 1934, *R.D. Comm.* 1935, II 531, 540, held valid the promise to repay in gold, while App. Berlin *(Kammergericht)* convicted the lender of usury. Judgment of Sept. 22, 1922, *Leipziger Zeitschrift*, 1922, 658.

In *Hollingsworth* v. *Ogle*, 1 Dall. 257, 1 L.Ed. 126 (Pa., 1788), a loan had been made in depreciated Continentals. The debtor gave a note payable in hard money for 40 percent of the nominal value of the sum received, this amounting to eight times the metallic value. The court held that the arrangement was not necessarily usurious since it protected the creditor against depreciation and the debtor against appreciation beyond forty percent. The court, however, denied a recovery of more than twice the metallic value of the Continentals given.

94. Judgment of Dec. 17, 1931, *J.W.* 1932, 765. Following a similar line of thought, the German Minister of National Economy later on warned the electricity firms against inserting gold clauses into their contracts. *Deutscher Reichsanzeiger* of Dec. 5, 1936.

95. App. Hamburg, Nov. 19, 1937, *Hanseatische Rechts- und Gerichtszeitschrift* 1937 B 439.

Section 19

LEGISLATIVE RESTRICTION OF GOLD CLAUSES

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I. Comparative Survey

Legislative interference with gold clauses has occurred for centuries. A statute abrogating gold clauses was enacted in Venice in 1517,[1] and there are even earlier instances.[2] France knew similar legislative measures during the John Law adventure.[3] However, World War I and the subsequent monetary crises initiated the great era of gold clause restrictions. There were two successive waves of them. The first was directly caused by World War I and its aftermath;[4] the second, and much more important, by the world monetary crisis which broke out in 1931.[5]

1. L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891) 312, n. 54.

2. In England, under an ordinance of 1429, foreign merchants were forbidden to demand payment in gold coin or to refuse payment in silver. 8 Henry VI, ch. 28. In 1403 the *Rappenmünzbund*, a monetary confederation in the Upper Rhine area adopted a rule permitting interest on gold debts to be discharged by silver coin. Julius Kahn, *Der Rappenmünzbund* (1911) 52.

3. *Supra*, p. 5, n. 263.

4. Belgium: Aug. 2, 1914, *Bulletin Usuel des Lois*, 1914, 456, and decree of Oct. 25, 1926, Art. 7, *ibid.*, 1926, 277 at 278 ["Monetary and Central Bank Laws of Belgium," League of Nations, *Economic Intelligence Service* (1932) no. 3, p. 27]; Bulgaria: May 12, 1921, *Baron's* of June 6, 1932, p. 10; Egypt: Aug. 2, 1914, *J.D. Int.* 1933, 1063, 1065 and *ibid.*, 1935, 1103; Germany: Sept. 28, 1914, *R.G. Bl.* 1914, 417; Greece: July 21, 1914, Dec. 23–30, 1914, May 11–15, 1917 [abrogating gold clauses, a law of May 15, 1923 permitting future gold value clauses, see Ténékidès, *J.D. Int.* 1923, 1014]; Italy: several decrees issued from 1916 to 1921 [tr. in the writer's *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928) 80], repealed by decree of March 30, 1928, no. 573, *Raccolta Ufficiale*, 1928 I 1073; Jugoslavia: April 24, 1920, quoted by the Supreme Court of Austria in the judgment of Oct. 9, 1930, *Die Rechtsprechung*, 1931, 11 at 13; Roumania: Dec. 21, 1916, see *Vertraglicher Schutz (supra)*, at 84 (German translation).

5. Australia: New South Wales, Act 14 of 1934; Austria: a series of ordinances of 1933, replaced by the Gold Clauses Act of April 27, 1937, *Bundesgesetzblatt*, 1937, no. 130 (*J.*

The climax was reached by the Congressional Joint Resolution

D. Int. 1937, 643, see also *infra*, p. 294); Belgium; April 11, 1935, *Bulletin Usuel des Lois*, 1935, 494 (see Moreau, *La Clause-Or*, 1935), and as to the measures taken in the case of Belgian Government gold bonds, *infra*, p. 427, n. 45; Brazil: Nov. 27, 1933, no. 23501, *Bull. I.I.* XXX (1934), 261 and Jan. 27, 1933, *ibid.*, XL (1939) 284; Canada: April 10, 1937, *ibid.*, XXXVII, 109, replaced by the Gold Clauses Act, 1939, *ibid.*, XLI (1939) 84 (supplementary statutes were enacted by Canadian provinces such as Manitoba, Laws of 1937, c. 17, *Bull. I.I.* XXXVII (1937) 110; New Brunswick, Laws of 1937, c. 45, cited [1937] 4 All. E.R. 520, and Quebec, Laws of 1937, c. 10, *Bull. I. I.I.* XXXVIII (1938) 65; *Chile*, April 18, 1932, no. 5,107, *Boletin de Leyes* CI(1) 659; *Colombia*, Act of 1933, no. 46, referred to in the case cited *infra*, n. 48; *Costa Rica*, Jan. 15, 1932, *La Gaceta*, Jan. 16, 1932 [mentioning only foreign currency clauses]; *Cuba*, May 22, 1934, *Gaceta Official*, May 23, 1934; *Danzig*, May 2, 1935, *Gesetzblatt für die Freie Stadt Danzig*, 1935, 617, as amended *ibid.* pp. 797, 991; *Denmark*, Nov. 27, 1936 (No. 254), *Bull. I.I.I.* XXXVI (1937), 84 and 97; *Ecuador*, Decree of Dec. 16, 1932, *Registro Oficial*, Dec. 29, 1932, p. 3; *Egypt*, May 2, 1935, *J.D.Int.* 1935, 1103 at 1106; *Esthonia*, July, 1933, see Barry, "Gold", 20 *Va. L.R.* 263 at 303, n. 81, 1934; *Germany*, June 26, 1936, *R.G.Bl.* 1936 I 515; Dec. 5, 1936, *R.G.Bl.* 1936 I 1010; Nov. 24, 1937, *R.G.Bl.* 1937 I 1305, all of them limited to certain types of gold clauses, Nov. 16, 1940, *R.G.Bl.* 1940 I 1521; (general abrogation) U. S. Military Government, July 17, 1947, *Military Government Gazette*, Aug. 1, 1947, p. 15; *Greece*, July 29, 1932, and August 1, 1935 (see Ténékidès in *Bull. I.I.I.* XXVIII (1938) 241 at 249 and *J.D.Int.* 1936, 1020 at 1022; *ibid.* 1937, 159; cases revealing a strong pro-debtor trend in *J.D.Int.* 1938, 122 *et seq.*); *Guatemala*, April 26, 1934, *Diario de Centro America*, May 3, 1934; *Honduras*, Decree no. 141 of 1934; *Hungary*, Aug. 28, 1931, Law no. 4600/1931 (German translation in *Das Devisenrecht der Welt* [1932] 94); *Italy*, Oct. 5, 1936 No. 1745 *Raccolta Ufficiale* 1936, 3231, Art. 3 and—Feb. 27, 1939 No. 337, *ibid.* 1939 I 345—see Ascarelli, *Foro Italiano* 1949 I 158; *Luxembourg*, Decree of May 14, 1935, *Bull. I.I.I.* XXXIII (1935) 108; *Mexico*, July 27, 1931, *Diario Oficial de Mexico*, July 27, 1931, no. 23 as amended on April 26, 1935, *ibid.*, April 27, 1935, no. 50; *Netherlands*, May 24, 1937, *Staatsblad*, 1937, no. 204, also *Bull. I.I.I.*, XXXVI (1937) 313; XXXVII (1937), 144; for a collection and translation of prior Dutch cases, see Sack and Meyer-Collings, *Gold- und Valuta-Klausel* [1937]; *Dutch Indies*, Oct. 28, 1937, *Bull. I.I.I.* XXXVIII (1938) 282; *Paraguay*, see U. S. Dept. of Commerce, *Handbook of Foreign Currencies* (1936), 159; *Poland*, June 12, 1934 (see Domke, *Bulletin de la Société de la Législation Comparée* 1934, 365; *Bull. I.I.I.* XXXVI (1937) 352, and cases collected by Bossowski in *Zeitschrift für Osteuropäisches Recht* (New Series) III (1936) 410 and IV (1938) 513); *El Salvador*, Decree of May 31, 1933, see *Handbook of Foreign Currencies* (1936) 182; *Sweden*, June 17, 1932, *Svensk Forfattningssammling*, 1932, no. 212; *Turkey*, mentioned in the argument of *Procureur Général* Matter in the Heraclea case, *J.D. Int.* 1932, 408; (see also *Kricorian* v. *Ottoman Bank*, 48 T.L.R. 247 [K.B. 1932]); *Union of South Africa*, Act no. 8 of 1933.

of June 5, 1933.[6] In legal history there is probably no other enactment of a purely private-law character which has engendered financial dislocations to such a vast extent and which though national in itself has caused such severe repercussions in the international field.

Only very few countries, particularly England and Switzerland, have refrained from direct judicial or legislative interference with gold clauses. The explanation is that these countries were not seriously confronted with the problem. England, as was seen, had on the whole steered clear of gold clauses.[7] They were sometimes used in English foreign financing, but to this extent the attitude of the English courts was not far removed from that of the French. Where the English were on the creditor side gold clauses were enforced even in the teeth of foreign gold clause abrogation,[8] whereas in the case of the large Morgan loan of 1917, the English government, being the debtor, was permitted to benefit from the Joint Resolution.[9] Thus England did not fail to avail herself of gold clause abrogations. Since 1931 the clauses have been impaired through gold export prohibition, and other measures of exchange control.[10] In Switzerland, too, only isolated gold clauses have appeared in litigation, and have

6. 48 Stat. 112; 31 U.S.C. 463. Its essential prescriptions read as follows: (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law. (b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations. . . .

7. *Supra*, p. 227.

8. *Infra*, sec. 30 II. See also *supra*, p. 274, n. 65.

9. *Infra*, sec. 29 II.

10. The Defense (Finance) Regulations Amendment (No. 2) Order, 1939, No. 1620, S.R. & O. 1939 I 862, no. 3. Regarding exchange control see *infra*, sec. 31.

been held valid,[11] but resistance is not entirely absent [12] and trading in and export of gold coin has been subject to license since 1936.[13] A particular situation prevailed in Argentina. There the "gold peso" was customarily understood to mean 2.27 paper pesos (1 paper peso=44 gold centavos).[14] In 1941 the Supreme Court gave full recognition to a gold clause which did not admit of such construction, but the particular circumstances of the case, as well as its late rendition, suggest that practically the solution of the gold clause problem had previously been reached on the basis of the customary meaning of "gold peso." [15]

In fact, the world-wide sweep of gold clause invalidation or elimination was an elemental and overpowering event which in itself bears out the appropriateness of abrogating legislation. At the same time the general resort to legislative measures reflects the prevailing conviction that the heavy responsibility involved could not be left to the judiciary. Nevertheless, one can understand that opposition to the inevitable was bitter and obstinate. It could rely on such high principles as the binding force of promises and the sanctity of property.[16] The clash of ideals and interests was bound to resound sharply in the courtrooms. Every device of legal emasculation was brought forward in order to defeat the objectives of the interfering legislation.

II. The American Gold Clause Cases [17]

The contest found its most dramatic expression in the Supreme Court of the United States when in February, 1935, that court

11. The main case—Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung* 64 II 88, 101—was one of international finance; in Superior Court Zurich, Sept. 17, 1937, *Schweizerische Juristen-Zeitung* XXXV (1939) 155 and App. *(Cour de Justice Civile)* Geneva, Jan. 22, 1937, *Bull. I.I.* XXXVII (1937) 114, it is not clear whether the situation was international or domestic.

12. *Supra*, p. 278, n. 92.

13. *Supra*, p. 79, n. 20.

14. *Supra*, p. 130.

15. For references see *infra*, p. 247, n. 37.

16. There were other reasons for the reluctance of the Hitler government generally to abrogate gold clauses (*supra*, n. 5). Debts destroyed by the great inflation had been revalued in terms of gold marks, and Hitler had promised that there should never again be depreciation as in democratic times. The "revalued gold mark" was therefore a touch-me-not to him. Otherwise the régime disfavored gold clauses. See, e.g., Jürgensen, "Immer noch Währungsschutzklauseln," *J.W.* 1937, 2947. They were finally invalidated under the impact of World War II.

17. a. *Literature preceding the Gold Clause decisions:* Barry, "Gold" 20 Va.L.Rev. 263 (1934); Collier, "Gold contracts and legislative power," 2 Geo. Wash. L.R. 303

was called upon to decide the Gold Clause cases which challenged the constitutionality of the Joint Resolution of 1933. Not only were the financial interests involved unprecedented, but the theories of both parties were nurtured by two opposite and deep trends in American monetary thought: the "hard money" and the "cheap money" policies.[18] Tension was enhanced by the conflict, then at its height, between the Roosevelt administration favoring the debtor class, and the court which had a natural tendency to protect the legal right against legislative encroachment. Nevertheless, the court upheld the Joint Resolution to all intents and purposes by a five to four vote, but within the majority—consisting of Chief Justice Hughes and Justices Brandeis, Roberts, Cardozo and Stone—opinions differed greatly. The result was a scientifically unsatisfactory compromise.

In the first case, *Norman* v. *Baltimore and Ohio R. Co.*,[19] the plaintiff brought suit on a 22.50 gold-dollar coupon of defendant's gold bond, claiming alternatively $22.50 in gold or its equivalent, $38.10, in legal tender. The court dismissed the action, holding

(1934); Hanna, "Currency control and private property", 33 Col. L.R. 617 (1933); Nebolsine, "The Gold Clause in private contracts", 42 Yale L.J. 1051 (1933); Nussbaum, "Comparative and international aspects of American Gold Clause abrogation", 43 Yale L.J. 53 (1934); Post and Willard, "The power of Congress to nullify Gold Clauses", 46 Harv. L.R. 1225 (1933); Rothenburg and Bowers, "Economic and legal aspects of the Gold Clause dilemma", 1 Geo. Wash. L.R. 493 (1933), Thorpe, "Contracts payable in gold", *Sen. Doc.* No. 43, 73d Congress 1st Session 1933; Zelkovich, "Effect of Gold Clauses under recent legislation", 29 Ill. L.R. 635 (1935). *Cf.* the briefs prepared by the United States Government in *U. S.* v. *Bankers Trust Co.*, Oct. Term, 1934, Nos. 471 and 472, *Nortz* v. *U. S.*, Oct. Term, 1934, No. 531, and *Perry* v. *U. S.*, Oct. Term, 1934, No. 532, containing a wealth of valuable material.

b. *Literature subsequent to the Gold Clause decisions:* Carpenter, "The Gold Clause Cases", 8 So. Cal. L.R. 181 (1935); Dawson, "Gold Clause decisions", 33 Mich. L.R. 647 (1935); Dickinson, "The Gold decisions", 83 U. of Pa. L.R. 715 (1935); Eder, "The Gold Clause Cases in the light of history", 23 Geo.L.J. 359, 722 (1935); Hart, "The Gold Clause in United States bonds", 48 Harv. L.R. 1057 (1935) [an acute and penetrating analysis; though sometimes perhaps overpointed], Zelkovich, "Historical critique of the Gold Clause decisions", 29 Ill. L.R. 1058 (1935); Pennock, "The Private Bond Case as a postponement of the real issue", 84 U. of Pa. L.R. 194 (1936); Collier, "Gold contracts and currency regulation", 23 Corn. L.Q. 520 (1938).

For the literature on the International-Law and Conflict aspects of the Joint Resolution, see *infra*, sec. 29, n. 1.

18. *Infra*, secs. 42, 43.

19. 294 U.S. 240, 55 S.Ct. 103, 79 L. Ed. 650 (1935). This decision covers the companion case, *U. S.* v. *Bankers Trust Co.*, Oct. Term, 1934, Nos. 471, 472.

that gold clause abrogation was constitutional as to private debts. The Court found no difficulty in declaring that the power of Congress "to establish a monetary system" included the power to requisition gold coin and thereby to affect gold coin clauses. As to the gold value clause, implicitly contained in a gold coin clause,[20] and thus in the defendant's coupon, the Court pointed out that the annulment of such clauses served to maintain "a uniform monetary system, and to reject a dual system." [21] When the Joint Resolution was passed, devaluation, the Court said, was not yet accomplished but was in prospect. Anticipating the determination to be made of the value of the currency, Congress was justified in striking out private agreements interfering with its policy of a uniform currency.

By this argument the Court put its decision squarely on technical monetary grounds, barring further expansion of Congressional powers.[22] Yet the justification offered by the Court is open to objection. No question of "dual currency" was raised by gold *value* clauses, which merely bear upon the sum owed. And the emphasis laid upon the forthcoming "devaluation" is, perhaps, a bit far-fetched. It seems more natural to interpret the Joint Resolution in terms of what had already happened [23] rather than in terms of what might happen. In fact the Act is justifiable, without resort to devaluation, on the ground of the previous abandonment of the gold standard. After that step was taken in March, 1933, the Joint Resolution was passed to put each and every dollar-creditor on the same level, hence to compel all creditors to share equally in monetary losses brought about by a national emergency, rather than to permit them to protect themselves by routine clauses. The fact that American courts during the greenback period believed and that French courts still believe that *cours forcé*, results *ipso facto* in annulment of gold clauses,[24]

20. *Supra*, p. 248.

21. 294 U.S. 240 at 316.

22. The Joint Resolution, in its preamble, invokes the value-regulating clause of the Constitution, but the Court did not place its decision on this ground. On that clause, *supra*, p. 31, *infra*, sec. 41 II.

23. As was in fact done by Mr. Justice (later Chief Justice) Stone, dissenting, in *Guaranty Trust Co. of New York* v. *Henwood*, 307 U.S. 247, 262, 59 S.Ct. 847, 83 L.Ed. 1266 (1939). He pointed out that the Joint Resolution was necessary in order to attain the objective of the prior measures (suspension of gold redemption; prohibition of hoarding and exporting gold; requisitioning of gold). That objective he stated to be "the suspension of the use of gold as a standard of currency value." The latter formula, however, was not accurate as the value of the dollar was measured by gold in the interim period also.

24. *Supra*, pp. 263, 274.

brings home the close relationship between that annulment and monetary regulation, and consequently illustrates the bearing which the long recognized currency power of Congress had on the annulment.

In *Perry* v. *United States*,[25] the third gold clause case reported, the plaintiff, holder of a $10,000 United States Liberty Bond of 1917, claimed $16,931.25 on the basis of the gold clause of the bond.[26] The Court held the Joint Resolution unconstitutional in so far as it abrogated gold clauses in government bonds. While Congress, under the Constitution, has power to borrow money on the credit of the United States, it has not been vested, the court held, with authority to alter or destroy the obligation resulting therefrom. The opposite contention of the government "necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that when the Government borrows money, the Credit of the United States is an illusory pledge. We do not so read the Constitution." [27]

After such strong language, one might expect that the United States would have been held liable to pay the plaintiff $16,931.25 and the holders of gold bonds 34 billion dollars instead of 20 billions besides 1,200 million dollars yearly interest instead of 700 millions.[28] The effects on the already unbalanced federal budget would have been catastrophic and it would have been impossible to carry out such a decision.[29] As a matter of fact the Court did not award the $16,931.25 demanded. In assessing damages the Court observed that the plaintiff was not entitled to obtain gold coin for recourse to foreign markets or for dealings in foreign exchange. Nor was there a free domestic market for gold. Under these circumstances the "equivalent" of the gold coin promised

25. 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

26. The gold clause of the Liberty Bonds read "gold coin of the present standard of value." It is at variance with the customary phrase, "gold coin of the present standard of weight and fineness," but this difference is irrelevant and was not referred to by the Court. See Hart, *supra*, n. 17(C), at 1084.

27. Judgment in the preceding note, at 250.

28. The figures are taken from the government's brief in the *Perry* case, p. 13. The judgment states that the amount of outstanding bonds had been reduced to approximately 12 billion dollars. However in the case of unconstitutionality of the Joint Resolution the owner of the redeemed bonds would possibly have been entitled to additional payments.

29. It was positively reported, and not contradicted that President Roosevelt had decided, in the contingency of an adverse judgment, to go before the people and to declare that it would be factually impossible to carry out the decision. *New York Times*, Feb. 21, 1935.

could only be ascertained in terms of purchasing power and in view of domestic transactions. The plaintiff had not shown any loss whatever in these respects. The damages demanded would therefore "constitute not a recoupment of loss in any proper sense but an unjustified enrichment".[30]

The subtle theory of the Court seems to be that under pressure of emergency the implied gold value clause had been recast into a clause purporting indemnification for loss in purchasing power. This conclusion, however, was not proved by the Court. It is true that the plaintiff could not use his gold in foreign markets or deal in foreign currency. Still, it is with an eye to possible disturbances due to monetary legislation that gold value clauses are agreed upon. The creditor, apprehensive that he may be unable to obtain and to realize on gold, intends to get at least the true value of gold in legal tender, that is, the value in the world market if "a domestic market for gold is not existent." The Court did not, and could not contend that such a proviso was void, except under the Joint Resolution, the validity of which was denied. However, interpreting the clause as the Court did, was "not a construction, but a nullification of the clause." It was, in fact, the "Tantalus" interpretation which was adopted by the Court, tempered by a "purchasing power" allowance. But that allowance was practically negligible. So far as losses in purchasing power are concerned, nearly all imaginable plaintiffs were in exactly the same situation as was Mr. Perry. Only foreign bondholders, it seemed at first sight, might be able to prove a loss in purchasing power. Still, the foreign holder of a Liberty bond, too, was subject to the restrictions referred to by the Court; the actual place of gold payment being Washington, he could neither export nor even receive the gold.[31]

In conclusion, the damages theoretically awarded by the Court amounted to nothing.[32] Practically, the elimination of gold clauses from government bonds was confirmed.

30. 294 U.S. 330, at 358.

31. Professor Jèze was mistaken in ascribing to the minority of the Court the declaration that the reasoning of the majority was invalid for foreign holders of American gold bonds. Jèze, "Défaillances d'Etat," *Rec.Ac.* LIII (1935) 377, 414.

32. The obscurity of the *Perry* case made itself felt when subsequent to the Joint Resolution the American Government began to call for payment the outstanding Liberty Bonds, all of them gold bonds and bearing interest at the relatively high rates of 3-½ and 4-¼ percent. Notice of redemption under the terms of the bonds stopped running of interest. In *Machen* v. *U. S.*, 87 F.2d 594 (C.C.A.4th, 1937), the plaintiff, holder of a Liberty Bond, claimed that, the gold clause being still valid under *Perry* v. *United States*, notice of redemption could

The third of the gold clause cases, *Nortz* v. *United States*,[33] which is the second in the official series, is of a different character. Nortz, former owner of $106,300 in gold certificates delivered by him to the government on January 17, 1934, claimed the sum of $64,334.07 in addition to the $106,300 received as the nominal equivalent of the gold coin. The Joint Resolution was not involved in this case since the Act, in terms, excepts "currency" from the "obligations" affected.[34] Thus, no ordinary gold clause was presented. However, the plaintiff contended that having delivered the certificates under the laws and decrees requiring such delivery, he was entitled to the indemnification claimed. Judgment was for the Government on the ground that on January 17, 1934, the legal parity of the dollar had not yet been changed.[35] By January 31, 1934, the day of devaluation, practically all gold coin, gold bullion and, with some limitations, gold certificates, had been requisitioned. Since the Court held the requisition day decisive, it thus disposed of the possible claims of practically all of the former owners.

Juridically, however, the position taken by the Court is questionable. Damages rather than "debts" are in point, and damages should secure to the creditor the real equivalent of his loss. In fact the Court suggests still another line of reasoning: "Had plaintiff received gold coin for certificates, he would not have been able, in view of the legislative prohibition, to export it or to deal in it." This viewpoint is the same as that of the *Perry* case: where no loss in purchasing power is proved, there are no damages.

Actually the holders of gold certificates had been deprived of their right to receive gold coin as early as the President's Proclamation on March 6, 1933, and the Emergency Banking Relief Act of March 9, 1933.[36] When the Court handed down its judgment

stop interest only if aimed at a payment to the bondholder of the full gold value. The court allowed the interest claim. The Supreme Court reversed in *Smyth* v. *United States*, 302 U.S. 329, 58 S.Ct. 248, 82 L.Ed. 294 (1937), avoiding an interpretation of the *Perry* case. Mr. Justice Stone, concurring, rightly pointed to the necessity to overrule the *Perry* case.

33. 294 U.S. 317, 55 S.Ct. 428, 79 L. Ed. 907 (1935).

34. On the "warehouse-receipt" feature of gold certificates, *supra*, p. 73, n. 4.

35. The same theory underlies the *Gold Reserve Act* of Jan. 30, 1934, § 2(a), 48 Stat. 337, 31 U.S.C. 441, which with immediate effect vested the title in the gold holdings of the Federal Reserve Banks in the United States.

36. *Infra*, sec. 43, n. 20. Substantially the same view was taken in *British-American Tobacco Co., Ltd.* v. *Federal Reserve Bank of New York*, 104 F.2d 654 (1939) [by Judges Learned Hand, Swan, and Augustus N. Hand].

these measures had become final.[37] If injury was suffered, it was on March 6, 1933, but on that date there could have been no question of a loss in purchasing power of the dollar. It is surprising that the Government did not make this point. Its legal significance consists in shifting further back the decisive day for the computation of damages. The argument that there was no loss in purchasing power, would have been strengthened thereby.

The denial of claims exceeding the face amount of the currency affected also applies, of course, to the holders of Federal Reserve and United States notes, all of which were made irredeemable in March, 1933. Under the theory of the minority of the court, the holders of these notes, too, would have been entitled to compensation on the basis of world-gold prices. The minority did not mention the notes, but since they, too, contained an "express promise by the United States to deliver gold coin" they came under the theory of the minority just as the gold certificates. The consequence demonstrates the absurdity of the minority position.

Under these circumstances there was little basis for the Court's censure of the Government, which was greatly aggravated by the assumption that Congress was "disregarding the obligations of the Government at its discretion." [38] No finding warranted such an assumption, and it was firmly denied by Mr. Justice Stone in a compact and extraordinarily impressive concurring opinion. Congress wanted no more than to have the Government participate in benefits accruing to every debtor from general monetary measures. In fact, the Court refuted its own censure by the acknowledgment that the "Perry's" were striving for "unjust enrichment." By preventing "unjust enrichment" Congress could not possibly have violated the Due-Process clause. The challenging language inflicted by the Court upon the legislative and executive branches of the Government in the Perry case only demonstrates the danger inherent in the democratic form of government that the court may overstep its boundaries. In this respect one is reminded of the *Reichgericht's* offensive against the democratic German government in the revaluation question.[39]

While the majority opinions are subject to considerable criticism, the dissenting opinion read by Mr. Justice McReynolds for himself and for three of his brethren, was far more reprehensible. It condemned the Joint Resolution entirely. The opinion ends in this sentence: "Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is

37. By incorporation into the Gold Reserve Act of Jan. 30, 1934, § 6, 48 Stat. 337, 340, 31 U.S.C. § 408a.

38. *Supra*, p. 286.

39. *Supra*, p. 211.

appalling." The Justice, in pronouncing the opinion, referred to Nero as to a precursor of Congress and made other stringent remarks.[40] Some years later, in *Smyth* v. *United States*,[41] Justices McReynolds, Sutherland and Butler, in a dissenting opinion, even ventured to stigmatize the call by the government for accelerated payment of the Liberty bonds as "a dishonest effort to defeat the contract and to defraud the creditor" because the government intended to pay the nominal amount of these gold bonds; and they insinuate that those who see the situation differently do not "reverently fix their gaze on the Eighth Commandment." Such language was without parallel in the history of the Supreme Court.[42]

While the ostensible invalidation of the Joint Resolution in the Perry case has drawn sharp criticism,[43] some writers have steadfastly clung to unreserved condemnation of the Joint Resolution—it is true more on grounds of historical sentiment rather than of legal analysis. That statute has been represented as out of character, as un-American, so-to-speak.[44] Nonetheless the Supreme

40. They were not officially recorded, but Mr. J. Reynolds published the text of his pronouncements, somewhat belatedly, in 18 Tenn.L.Rev. 768 (1935). The press had widely commented on his remarks, partly on the basis of utterances which were not confirmed by the Tennessee publication.

41. *Supra*, n. 32.

42. A significant detail of Mr. Reynolds' opinion deserves mention. He referred to the decisions of the Permanent Court of International Justice in the cases of Serbian and Brazilian Loans (1929) upholding the gold clause, *infra*, sec. 29 I. This was apparently meant for the Chief Justice, who had been a member of the Permanent Court when those cases were decided. The intimation was that the Chief Justice contradicted himself. In reality, the Permanent Court, on considerations of private international law, had proceeded on the basis of the French doctrine, which, in *international* relations, upheld the gold clause, but condemned it in domestic relations *such as existed in the Gold Clause cases.*

43. Particularly by Collier, Dickinson, and Hart, *supra*, n. 17.

44. See the articles of Eder and Zelkovich, *supra*, n. 17. Jerome, *Government and Money*, (1935), would even deny the Government of the United States, in the face of a world monetary crisis, the right to make unredeemable notes legal tender. This was indeed an extreme case of dogmatism. One may also mention that the Ohio Court of Common Pleas in *Equitable Life Ass. Soc.* v. *Freda*, 32 Oh.-N.P. 65 (1934), argued that the abrogation of gold clauses would amount to confiscation without compensation and *could therefore not have been intended by Congress.* According to this opinion, the Joint Resolution was meaningless.

A more serious problem arose from the fourth clause of the Fourteenth Amendment to the Constitution, enacted 1866, according to which "the validity of the public debt of the United States authorized by

Court and other American courts have later expanded the field of the Joint Resolution far beyond what had been originally expected,[45] a fact which amounts to another judicial recognition of the merits of the enactment. Further litigation against the government in connection with the gold question,[46] was cut off by a Joint Resolution of August 27, 1935, which withdrew the privilege to sue the government after January 1, 1936 for any seizure of coin, currency, bullion, or upon government gold securities.[47]

III. Judicial Challenge of Gold Clause Abrogation Outside the United States

Though judicial supervision of the legislature exists nowhere to any comparable extent as in the United States, attempts at nullifying legislative abrogation of gold clauses have been undertaken in other countries with the same negative effect. Thus the Supreme Court of the Republic of Colombia, affirming the constitutionality of gold clause abrogation,[48] referred to the sovereign power of the state over the currency and declared that gold clause agreements constituted discrimination between the components of that currency contrary to the policy laid down by the Legislature. This argument, which is tantamount to the opposi-

law . . . shall not be questioned." The Court briefly cited the Amendment in support of the *Perry* decision (at p. 354) though admitting that the Amendment was undoubtedly inspired by a desire to give reassurance to the wartime creditors of the Federal Government (the obligations of the Confederacy were repudiated). In fact, one should not read into the Amendment perpetual fetters on the United States. *Cf.* on this question Eder "A forgotten section of the Fourteenth Amendment" 19 Corn.L.Q. 1 (1933); Hart, *supra*, n. 1, at 1068, n. 40; Government brief in the *Perry* case (n. 532) 61, 67, 85.

45. *Infra*, pp. 435, 436.

46. An instance of such litigation is *Bakewell* v. *United States*, 28 F. Supp. 504 (E.D.Mo.1939), *aff'd*, 110 F.2d 564, *cert. denied*, 310 U.S. 638, 60 S.Ct. 1081, 84 L.Ed. 1407 (1940). Plaintiff bought in 1935 one Liberty Bond of $1000 after it had been called for redemption. He then published in 1936 a study, *Past and Present Facts about Money in the United States*, in which he tried to rebut the Gold Clause decision. His claim was disallowed by the Court as one for unjustified enrichment. His book was reviewed by the present writer in 37 Col.L.Rev. 162 (1937).

47. 49 Stat. 938 at 939, 31 U.S.C. 773b. The Act also authorizes the Secretary of the Treasury to exchange "coins or currencies" of the United States for "other coins or currencies" and to make payment within a certain period to owners of gold clause securities of the United States, even though not matured. 49 Stat. 938, 31 U.S.C. 773a. Only a "dollar-for-dollar" payment was authorized. *Machen* v. *United States*, 87 F.2d 594, 597 (1937).

48. Judgment of Feb. 25, 1937, *Gaceta Judicial* XLIV 613.

tion of the American courts to a "dual monetary system", is supported by the Court's emphasis on the "nominalistic principle". The Court, however, rather goes out of bounds in stating that determination of the media of payment is no proper element of contracts at all.

In the Free State of Danzig also it was held by the Superior Court (*Obergericht*) that the Danzig gold clause abrogation did not violate the Danzig constitution.[49] The Court denied that general legislative action such as the abrogating law constituted an "expropriation" prohibited by the constitution except for just compensation.

In Greece the problem of constitutionality was raised in the field of contracts in foreign currencies. A decree of July 21, 1914, provided that debts contracted in Turkish *livre-or* (a gold coin) and payable in Greece were to be discharged in Greek paper drachmes at the rate of 22 drachmes for one *livre-or* (apparently an under-par ratio). The Court of Appeal at Saloniki held that the decree did not constitute an unconstitutional deprivation of property [50] because the state [51] was entitled to regulate the rate of foreign exchange to protect debtors against excessive losses resulting from fluctuations in the value of gold.

In Belgium, a Royal decree of April 11, 1935, abrogating gold clauses was attacked as unconstitutional by writers and by way of interpretation in the Chamber of Deputies, but courts, it seems, were not called upon to lay down a ruling on the issue.[52]

The English Court of Appeal has held, in a particular situation, that the Canadian Federal Legislature has power to regulate gold clauses but the reasons given are only of local interest.[53]

49. Judgment of Jan. 16, 1936, *Z.A. I.P.* 1936, 121 [passing on decrees of May 2 and July 3, 1935, regarding abrogation of gold clauses in mortgages].

50. Judgment of 1922, no. 139, *J.D. Int.* 1923, 1013. *Cf.* Court Athens, judgment of 1933, no. 439, *J.D.Int.* 1934, 185, in which reestablishment of gold clauses by a Greek decree of July 10/August 5, 1931, was held not to violate Articles 6 and 10 of the Greek Constitution. See Dareste, *Les Constitutions Modernes* (Paris, 1928) 625.

51. The French translation reads "*le pays*".

52. Piret, *Les Variations Monétaires et leurs Répercussions en Droit Civil Privé Belge* (1935) nos. 96, 102. *Cf.* also Moreau, *La Clause-Or* (1935).

In Argentina some discussion arose regarding the constitutionality of a Presidential decree of 1929 closing the Conversion Office and thereby ending the official inter-exchange of gold and pesos. Schoo, *La Clausula Oro* (1935) 390.

53. *British and French Trust Co.* v. *New Brunswick Railway Co.*, [1937] 4 All E. R. 516, 538 (C.A., 1937), referring to the fact that under the British North American Act of 1867,

In some cases the validity or applicability of legislative gold clause abrogation has also been tested by international or other courts on the basis of international agreements or of private international law.[54]

IV. Scope of Abrogation Acts

The enactments in question vary widely not only in phraseology [55] but in legal scope.[56] Some of them, such as the American Joint Resolution and the German and Belgian statutes, regulate gold clauses only; [57] others include debts couched in terms of foreign currency. The regulations may affect all types of gold clauses or only some of them. Thus the American and the Dutch statutes cover merely clauses coupled with dollars or guilders, respectively. The Belgian decree of 1935 deals only with leases and loans. The Swedish law of 1932 is confined to bonds issued in Sweden before September 28, 1931,[58] and the Danish law to Danish bonds before September 29, 1931. The Dutch law, in ad-

§ 92(10), the work of the defendant railway had been declared by an Act of the Canadian Parliament to be for the general advantage of Canada.

54. *Infra*, secs. 29 and 30.

55. During the French Revolution gold clauses were suppressed simply by adding to the provision rendering paper money legal tender, the phrase "notwithstanding any agreement to the contrary", *supra*, p. 263. This formula sometimes recurs in Latin legislation, but its significance is no longer certain. The old meaning is preserved in the Belgian and in the Egyptian ordinances of 1914 (the former Egyptian legislation being essentially French in character) and in the Italian legislation of the sixties as well as the thirties (*supra*, n. 5). See Cass. Naples, Oct. 18, 1873; Florence, Dec. 18, 1873; Dec. 10, 1874, *J.D. Int.* 1875, 229; Palermo, Feb. 19, 1875, *ibid.*, 1875, 230; Naples, May 2 and 11, 1876, *ibid.*, 1877, 84; Rome, Aug. 8, 1876, *ibid.*, 1877, 85. The Italian decree of Dec. 21, 1927, n. 2325, Art. 2, par. 2, *Raccolta Ufficiale*, 1927 IV 4869 (tr. *Federal Reserve Bulletin* 1928, 642) used different language of dubious meaning. Ascarelli, "Clausola oro e stabilizzazione della moneta", *Rivista di Diritto Internazionale*, 1929, 576, 583. That decree was superseded by the legislation of 1936 and 1939.

56. See Domke, "Les efforts législatifs tendant à restreindre la validité de la clause-or", *Revue Critique de Droit International*, 1938, 22.

57. Except that silver dollar clauses are probably affected by the language of the American Joint Resolution, because they call for "payment in a particular kind of currency." The silver "bullion" clause of the *Holyoke* case, *supra*, p. 224, n. 7, decided on Dec. 15, 1933, is likewise void under Justice Cardozo's theory on sham gold clauses in the other *Holyoke* case, *supra*, p. 231.

58. Even where this law does not apply there has been little hope for the recognition of gold clauses by Swedish courts, *supra*, p. 246, n. 35.

dition to other limitations, exempts all gold loans quoted on the Amsterdam Stock Exchange. Italian legislative abrogation of gold clauses after World War I was confined to pre-war loans of certain public utilities.[59] The German and the Belgian laws of 1914 were interpreted as bearing only on gold coin clauses.[60] Several statutes are of a retaliatory character.[61] Some, such as the German and the Danish, were termed provisional, but this was only the legally irrelevant expression of the legislature's hope of repeal.[62] The widest range was given to the measures of the military governments in the German occupation zones after World War II.[63]

Austrian law is outstanding for its intricacy. Despite monetary hardship and exchange control, the Austrian Supreme Court, in a remarkably independent spirit, upheld, as late as 1933, obligations couched in terms of gold or foreign currency.[64] The government therefore did not seek to strike out the gold clauses which actually were unbearable to Austrian debtors, but tried to find a middle ground. It recognized the gold obligation in principle, but rendered it more or less ineffectual by means of moratoria having no fixed terms, and by other limitations. The extremely complicated regulation was replaced in 1937 by another which, despite numerous qualifications, came nearer to direct abrogation.[65]

A more indirect device for invalidating gold clauses is presented by a Norwegian law of December 15, 1923.[66] Under this law the creditor remained entitled to demand gold payment, but was under a double legal penalty if he did so; the debtor upon such demand was given the right to defer gold payment until the Bank of Norway should have resumed redemption of its notes in gold, and in case the creditor would withdraw his refusal to receive

59. Reference *supra*, in n. 4.

60. *Reichsgericht*, May 24, 1924, *R.G. Z.* 108, 176; April 26, 1928, *ibid.*, 121, 110, and the Belgian cases, p. 250, n. 7. The sounder view certainly is to include gold value clauses in a prohibition of this type, considering the legislative intent. This was done by the Supreme Court of Colombia, April 28, 1937, *Gaceta Judicial*, XLIV 640.

61. *Infra*, p. 440.

62. As in the analogous situations, *supra*, p. 79.

63. *Supra*, n. 5, "Germany".

64. Judgment of Feb. 1, 1933, *Die Rechtsprechung*, 1933, 45.

65. See Loeb, *Die Regelung der Fremdwährungs-und Goldschuldverhältnisse* (1937). Short surveys are to be found in *Z.A.I.P.* 1934, 464 on the 1933 legislation; in *Oesterreichische Zeitschrift für Bankwesen* II 175 (by Löbl) on the 1937 legislation; and on the entire development in Janda, "Die Entwicklung der österreichischen Goldklauselgesetzgebung," *J.W.* 1938, 2598.

66. *Almindeling Norsk Lovsamling 1920-1923*, 1468; Eng. tr., in U. S. Department of Commerce, *Handbook of Foreign Currencies* (1936) 152.

notes, he had to wait three months for payment. This regulation reminds one somewhat of devices used in the American "wild cat" banking period.[67]

In spite of these and other diversities—especially those operating in the international field [68]—it seems possible to venture some general statements. The abrogating statutes do not bear upon sales of gold coins,[69] though such sales may be unlawful on other grounds.[70] Furthermore, it is generally not a criminal offence to undertake gold clauses, even where the law embraces future contracts, as does the Joint Resolution.[71] The gold clause agreement is void in such a case, but no punishment is imposed. Gold-clause "gentlemen's agreements" may be concluded, and payments made thereunder or under an agreement annulled by statute, are probably irrevocable if the payor knows that he is not legally bound to pay or if he has doubts thereon.[72]

On the other hand, invalidation extends to agreements involving a gold (value) payment by indirection only. A party to a contract,—for instance, a contractor—cannot validly stipulate the right to rescind the contract in case the other party would not pay an amount determined according to gold value. Though the latter party did not obligate himself directly to payment of a gold value, the agreement having exactly the same inflationary

67. *Infra*, sec. 41 V.

68. *Infra*, sec. 30 V.

69. *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324, 339, 57 S.Ct. 485, 81 L.Ed. 678 (1937).

70. *Supra*, p. 64.

71. This question arose, strangely enough, in the Polish Supreme Court when it applied American law to a gold dollar obligation. Judgment of Nov. 19, 1935, *Zeitschrift für Osteuropäisches Recht* III (1936) 412.

72. Under civil law the concept of *naturalis obligatio* would come into play, which prevents recovery of payments voluntarily made in fulfillment of a purely ethical or similar unenforceable duty. As to French law, cf. Civil Code 1235 and Planiol, *Traité Elémentaire de Droit Civil* II (11th ed., 1935), 296. The special question before us is dealt with in an article by Mazin, reported at length in *Recueil Civil et Notarial des Jurisclasseurs (Cahiers verts)* 1937, 176. As to German law, see Enneccerus-Lehmann, *Recht der Schuldverhältnisse* (11th ed., 1930) 9. Under the common law the doctrine of illegality would prevent recovery of the payments made. See Williston, *Contracts*, (rev. ed., 1936), sec. 1630. That payments in paper money of the gold value do not amount to a violation of the Joint Resolution was explicitly pointed out by Lord Wright of the Court of Appeal in *International Trustee* v. *The King*, [1937] A.C. 500 at 518-21 (1936). Mr. Justice Stone, in the *Norman* case, spoke of the "prohibition" by the Joint Resolution to pay the increased number of depreciated dollars (294 U.S. 360), but this term, also found elsewhere, is inexact.

effect as a typical gold clause runs counter to the public policy underlying gold clause abrogation.[73]

Silver clauses are generally not within the purview of the enactments. However, the Joint Resolution of 1933 contemplates rights to require payment "in gold or a particular kind of coin . . . or in an amount of money . . . measured thereby." This language seems to cover silver clauses. In the case of a silver "bullion" clause invalidation would have a surprising effect; it would deprive the debtor of the right to discharge the debt through delivery of silver bullion which is more heavily depreciated than the dollar. In other words, under these circumstances the Joint Resolution might help the *creditor*. However, ostensible silver bullion clauses may be deemed disguised silver dollar clauses.[74] In that case the striking out of the silver clause would be immaterial. The whole issue is probably no longer of practical importance.[75]

V. Effect of Abrogation

Where a gold clause contracted for is invalidated by the law, the question arises as to how the invalidation affects other parts of the contract. In the United States it is considered a matter of course that notwithstanding the elimination of the gold clause, the contract will operate to all intents and purposes as it did before, except that the debtor has to pay merely the nominal amount of the sum promised under the clause. This view obviously conforms to phrasing of the Joint Resolution which explicitly provides that every obligation purporting to give the obligee a right to require payment in gold or in money measured thereby "shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." [76] The gold clause consequently was simply

73. App. Bukarest, Dec. 31, 1936, *J.D. Int.* 1938, 950. The right of rescission, if it exists at all, cannot be exercised where the agreed maximum of depreciation was only temporarily and slightly exceeded. App. Douai, May 23, 1933, *Revue du Droit Bancaire*, 1934, 276. The promise by a mortgagor to increase the value of the mortgage "to its value in gold dollars measured by paper dollars" was properly held void in *Levy* v. *Asbestos, Ltd.*, 153 Misc. 125. 273 N.Y.S. 911 (1934), although neither payment in gold nor payment measured by the value of gold was stipulated.

74. *Holyoke Water Power Co.* v. *American Writing Paper Co.*, *supra* p. 224, n. 7, is in point.

75. The *Holyoke* case of 1933 was decided subsequent to the enactment of the Joint Resolution, but the question at hand was not discussed.

76. The Joint Resolution further provides that the abrogation of the gold clauses shall not invalidate the other provisions of the laws which

stricken from the contract.[77]

In countries where the currency was more heavily depreciated than the dollar in the United States, the problem was more serious. In Germany after World War I, the creditor, despite the abrogation of gold clauses, was allowed a higher rate of revaluation.[78] French and Belgian courts confronted with the heavy depreciation of the francs, tried to distinguish whether the clause was the essential and determining cause of the contract; [79] if so, the whole transaction was annulled,[80] while in the opposite case it was upheld minus the gold clause.[81] Long-term leases were

authorized federal gold loans. The underlying conception of the ancillary significance of gold clauses is important also in ordinary contractual relationships.

77. *Security-First Nat. Bank of Los Angeles* v. *De La Cuesta*, 15 Cal. App.2d 302, 59 P.2d 542 (1936). The court, in an able opinion, held good a sale made under public notice requiring payment in gold coin, the notice having been issued shortly before the nationalization of gold, while the sale took place after nationalization. The court pointed out that under the Joint Resolution, the requirement of payment in gold coin could be met by payment in any legal tender and that the gold clause was *ipso facto* extinguished at that time. Same: *Security-First Nat. Bank of Los Angeles* v. *Bennett*, 17 Cal.App.2d 641, 62 P.2d 798 (1936). A fortiori, public sales under deed of trust, notified and made in "lawful money," are valid although the deed contained a gold clause. *Durst* v. *Battson*, 9 Cal.2d 156, 69 P.2d 992 (1937); *Peterson* v. *Corporation of America*, 21 Cal. App.2d 527, 69 P.2d 904 (1937); *Prudential Ins. Co. of America* v. *Sly*, 7 Cal.2d 728, 62 P.2d 740 (1936); *Pacific States Savings and Loan Co.* v. *O'Neill*, 7 Cal.2d 596, 61 P.2d 1160 (1936). See also *Greene* v. *Uniacke*, 46 F.2d 916 (C.C.A. 5th, 1931), *cert. denied*, 283 U.S. 847, 51 S.Ct. 493, 75 L.Ed. 1455 (1931), where it was said that a bond containing a gold clause issued by a drainage district board would be valid even if the gold clause was invalid because of lack of authority on the part of the board. Cf. also *supra*, p. 245, n. 32.

78. *Reichsgericht*, March 1, 1924, *R. G.Z.* 107, 370; May 24, 1924, *ibid.* 108, 176; April 26, 1928, *ibid.* 121, 110. The routine character of the clause makes this ruling dubious.

79. Cass., Nov. 16, 1938, *Gazette du Palais* 1939 I 184; April 30, 1934, *Sirey* 1934 I 216. The question is even more important in connection with foreign-currency clauses, *infra*, sec. 24 III.

80. E. g., a 40-year lease by the *Hotel Ritz* in Paris, involving an annual rent of 270,000 gold francs and made in 1910, was invalidated, because of its gold clause, by Trib. civ. Seine, April 6, 1927, *D.H.* 1927, 296. Other instances pro and contra are listed in *Gazette du Palais* of April 21, 1939, p. 8, and in Planiol-Ripert, *Traité Pratique de Droit Civil Français* VII (1931), no. 1176. With regard to Belgian law, see Piret, *supra* n. 52, at 236. Ital. Case May 7, 1948, *Foro Italiano* 1948, I, 1128, extends the invalidity of a gold-value clause under the decree of 1936—*supra*, n. 5—to the other parts of a maintenance contract made in 1929.

81. Trib. civ. Rouen, Jan. 6, 1939, *Sirey* 1941 II 9 and other French

prominent in this type of litigation.[82] Maintenance of the leases was repeatedly vindicated on the ground that during the depreciation the lessor had acquiesced in the payment of the nominal amount, waiving thereby his right to gold payment.[83] The argument seems not very fortunate because it penalizes the creditor for what was probably his considerateness and forbearance.

In no case can restriction of gold clauses, legislative or judicial, be avoided by waivers declared in advance by the debtors. We encountered a waiver of this type, coupled with a pledge of honor, in the French case of *Do-Delattre* v. *Scouteten*.[84] More elaborate and business-like formulas were employed in many of the bond loans floated in the United States by foreign debtors after World War I.[85] There is no doubt that no court will recognize a waiver of the protection granted by the *lex fori*,[86] and where the protection waived originated in foreign law, applicability of the latter will also entail invalidity of the waiver.[87]

and Belgian cases cited in *Gazette du Palais*, *supra*, n. 80, and Piret 238; the Belgian cases are more favorable to the maintenance of the contracts.

82. In the case of Cass., Nov. 27, 1933, *D.H.* 1933, 585, a long-term lease contained a gold clause. The lessor under the regime of *cours forcé* having acquiesced in receiving the nominal amount of francs, the court held that the invalidity of the lease was cured. On the decisions of lower courts see Planiol-Ripert, *supra*, n. 80.

83. French Cass., Nov. 27, 1933, *D.H.* 1933, 585, and Belgian cases cited by Piret, *op. cit.*, p. 238, n. 2.

84. *Supra*, p. 263. A pledge of honor was also a feature of the Ritz case, *supra*, n. 80.

85. A number of pertinent clauses are collected in the *Bulletin of the Institute of International Finance*, New York, August 4, 1929, p. 19. The following clause has been taken from a 7 per cent 5-year Krupp gold dollar note of the inter-war period: "The Company waives any option or election or right it has or may hereafter have under the law of Germany, or otherwise, to pay principal of and interest and/or premiums, if any, on its indebtedness arising out of this agreement or Notes and/or coupons, in any currency other than that of gold dollars of the United States of America of or equal to the standard of weight and fineness existing December 15, 1924, as specified herein, and as specified in the Notes and coupons, and consents that any judgment against the Company taken in the Courts of Germany or of any other country because of any default by the Company in the performance of its obligations or any other matter or thing arising from this Agreement and/or the Notes and/or coupons and/or Indenture may be expressed in terms of gold dollars of the United States of America."

86. See the decision in *Do-Delattre* v. *Scouteten*, *supra*, p. 263. A limited and interpretative significance was attributed to the waiver clause in *Goodman* v. *Deutsch-Atlantische Telegraphen Ges.*, 166 Misc. 509, 2 N.Y.S.2d 80 (1938) [not a gold clause case].

87. *Reichsgericht*, May 28, 1936, *J. W.* 1936, 2058.

Litigation on gold clauses stipulated in negotiable instruments is complicated by the rule under which the holder of a bond or coupon must not deliver the bond or coupon to the issuer for its face amount lest the holder be estopped from bringing suit for the difference between that amount and the gold value. It seems highly questionable whether the holder can safeguard his right by a reservation made when receiving the face amount. In civil law courts there is a trend to hold such reservations effective.[88] Where this course is not followed [89] the average bondholder, not being prepared to conduct a lawsuit against the issuer, is practically compelled to collect his coupons at their face amount regardless of the validity of his claim for the gold value.[90]

Section 20

COMMODITY AND INDEX CLAUSES

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I. Commodity Clauses

Commodity clauses defining a debt in terms of commodities other than gold or silver will quite naturally emerge as a protective scheme under inflationary conditions.[1] In addition, they appear sometimes as a normal stipulation in long-term leases,

88. Court Amsterdam, Nov. 27, 1935, *Bull.I.I.I.*, XXXIV (1936) 105, and other cases cited by Domke, "Couponzahlung unter Rechtsvorbehalt des Gläubigers", *Schweizerische Juristenzeitung* XXXIII (1936) 102. Under French law the court, on the motion of a bondholder, may appoint a receiver for the collection of principal and interest; collection by the receiver of the face amount will not foreclose further claims of the holder. App. Paris, Feb. 22, 1938, *Recueil Civil et Notarial des Juris-Classeurs* 1938, No. 642.

89. In *Schwartzman* v. *Post*, 94 App. Div. 474, 84 N.Y.S. 922, 87 N.Y.S. 872 (1904), even an express agreement reserving the creditor's right was disregarded because of the transfer of the instrument. See also Uniform Negotiable Instruments Law § 119(4) and (5).

90. Responsibility of the collecting bank (trustee) to the bondholders was denied by the Swiss Federal Tribunal in *Aktiebolaget Obligationsinteressenter* v. *Bank für Internationalen Zahlungsausgleich*, judgment of May 26, 1936, *Amtliche Sammlung* 62 II 140.

1. In a Virginia bond of 1782 the obligor promised "to pay £1000 specie or such further sum" as would have been "equal to the said £1000 in the year 1774, that is to say to purchase as much land and Negroes as it ought have done in ready money at the present time." *Faulcon* v. *Harriss*, 2 Hen. & M. (Va.) 550 (1808).

fixing the compensation for the use of agricultural land in grains or in the value of grains.[2] This device, probably traceable to the tithes of old, tends to adapt the tenant's dues to his earnings from the land. While French courts generally frown upon agreements tending to sever the compensation contracted for from the fate of the franc, leases fixing the rent in the aforesaid manner have been held good. The *Cour de Cassation* has pointed out, among other things, that grain prices are determined by various economic factors of which the rate of exchange is only one.[3] Rents expressed in commodity values sometimes also occur in urban leases.[4]

2. Rents of this type are mentioned, *e.g.*, in Y.B. 9 Edw. IV, 49 (Hil. Term, pl. 6, 1470) and Anonymous, 4 Leonard 46, 74 Eng. Rep. 720 (1590). 'Litigation turned on the question of the determinative date for the reckoning of damages in case the rent was not paid. The court seems to have used the breachday rule. Corn as a measure of certain leases appears also in 18 Eliz., c. 6 (1575). The Act prescribes that leases of land and tenements of the colleges shall be made only with the provision that one-third of the lease be paid in "good wheat" and "good malt," to be delivered on days fixed in advance, and that, in case of default, payment, at the election of the lessees, shall be made in money at the rate as the best wheat and malt in the markets of Cambridge, Oxford, Winchester, and Windsor, respectively, shall be; leases containing contrary provisions shall be void.

In *Meason* v. *Philips*, 1 Add. (Pa.) 346 (1797), an indirect grain rent was presented, the debtor having obligated himself to furnish four bushels of wheat for each shilling of rent. Similar rent clauses seem to have been frequent.

3. *Cass.*, Feb. 18, 1929, and March 18, 1929, *Sirey* 1930 I 1. The Court also relied on the French statutes of July 12, 1905, as amended Jan. 1, 1926, and June 9, 1927 [*D.P.* 1905 IV 71; *D.P.* 1926 IV 74; *D.P.* 1927 IV 309], regarding the jurisdiction of the *Juges de Paix* and referring to agricultural leases providing for a rent wholly or partly payable in grain. The decisions of the lower courts are listed by Hubert, *Sirey* 1930 I 1 at 4 (ann.), and *ibid.* 41 (ann.). The French rule was followed by Trib. comm. Tournai, July 26, 1928. *Pasicrisie Belge* 1929 III 15.

A lease based on the official prices of flour and milk was held good by App. Milan, March 1, 1948, *Foro Italiano* 1948, I, 642.

4. In French urban leases rents stipulated in terms of market price of bricks have occurred. *Cass.* Dec. 22, 1930, *D.H.* 1931, 33.

A peculiar commodity clause was passed on in an American case, *Lilley* v. *Fifty Associates*, 101 Mass. 432 (1869). A Boston lot was leased in 1817 for 1,000 years, the rent being stipulated in terms of "first quality of Russia Old Sables iron". Since 1840 payment had been made in money. In 1863 the lessor, upon tender of greenbacks, demanded delivery of such iron, which however had not been imported into the United States since 1856. Forfeiture of the lease was denied on the ground that the landlord had not given timely notice of his desire to receive iron.

The most extensive use of the market prices of individual commodities as a device for financing was tried in Germany during the inflation 1918–1923, and the following deflation. Public utilities and industrial corporations then issued bonds for amounts to be determined by the market prices of certain commodities such as rye or coal.[5] At the same time German emergency legislation permitted the prices of rye, wheat, potash and certain kinds of coal to be used as standards for fixing the amount of mortgage debts[6] which, under the German land book system, must conform strictly to the forms provided by law. Actually, "rye mortgages" were given mostly by agricultural mortgagors, to special banking institutions which in turn procured the mortgage money by the issuance of "rye mortgage bonds". Within a few years the whole system proved a failure because of the fluctuations in rye prices and the shortcomings resulting from the complicated and variable computations necessary for the determination of the payments due.[7] Creation of "rye mortgages" and "rye bonds" then ceased.[8] Subsisting rye mortgages were, by a long and difficult process, more or less transformed through agreement of the parties into ordinary gold-mark mortgages, and finally converted into reichsmark mortgages by the national-socialist government.[9]

A particular shortcoming of these "stabilizing" devices as applied to mortgages consists in the difficulty to obtain a second mortgage if the first one is "stabilized". The reason is that the prospective second mortgagee is deterred by the uncertain monetary dimensions of the first mortgage from risking his own funds. Furthermore, the stabilized mortgage renders the sale of the mortgaged property more difficult, since the would-be purchaser cannot accurately compute what his net income will be.

Litigation over rye bonds is illuminating. Obviously neither in rye clauses, nor in gold clauses, can the day of maturity be decisive for the computation of the sum to be paid. A date must be agreed upon prior to the maturity date in order that rye prices

5. Maus, *Anleiheformen unter dem Einfluss der Geldentwertung* (1925).

6. Decrees of June 29, 1923, and Oct. 5, 1923, *R.G.Bl.* 1923 I 482 and 933.

7. See von Bissing, *Die Sachwertpfandbriefe und der Kapitalmarkt* (1928); "Die Agrarkredite", *Schriften des Instituts für Konjunkturforschung, Sonderheft* 3 (1927) 11; Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte*, (2d ed. 1926) 175 [with picture of a rye-bond].

8. This experience furnishes another argument against resting a monetary system upon the natural products of the soil rather than upon gold. On the "rentenmark" experiment, *supra*, p. 200.

9. Law of May 16, 1934, *R.G.Bl.* 1934 I 391.

may be gathered in sufficient time before maturity to allow the necessary computations. Moreover, in order to eliminate casual fluctuations the measure ought not to be the market price on a single day but rather the average price over a definite period. In a case decided by the *Reichsgericht,*[10] a German agricultural mortgage bank issued rye mortgage bonds with payments adjusted to the market price of rye; the interest due July 1 was dependent on the average price of rye from March 15 to April 14 and the interest due January 1 on the average price from October 15 to November 14. Inevitably protection to creditors will be diminished by a proceeding of this kind. The breakdown of the German mark in 1923 was so precipitous that, on the coupons due July 1, 1923, the creditors received a payment of one-eighth of the actual gold value of rye at that date, and on the coupons due January 1, 1924, one-thirteenth of the corresponding value. It is true, on regular mark bonds the holder would have received nothing, but the result of this most methodical and careful planning was discouraging enough.

Historically noteworthy is the use of "commodity rubles" by the Soviets in the "moneyless" years 1922–1923. Workers and other creditors were then compensated on the basis of a "ruble unit" determined monthly on the basis of the prices of victuals and other necessities.[11]

Generally, it can be said that the various forms of commodity clauses have not turned out well. Though from an economic point of view they appear to be desirable, the inherent legal and technical difficulties are too great. Remarkably, when the tithes and other dues in products were transformed into monetary obligations, the trend was invariably toward a fixation of definite amounts.[12] There are, however, generally no objections to the validity of an ordinary commodity clause.[13]

II. Index Clauses

"Index clauses" in contracts determine the amount of a pecuniary performance by reference to index numbers.[14] (The term "escalator clause" preferred in American usage is more vague).[15]

10. Judgment of Nov. 13, 1924, *R.G. Z.* 109, 174.

11. Bloch, "Zur Frage der Währungsstabilizierung und der Aufwertung im Sovjetrecht" (tr. from Russian), *Ostrecht* 1927, 249.

12. See, e.g., Gierke, *Deutsches Privatrecht* II (1905) 732, 737.

13. See, however, *infra*, p. 307, n. 42.

14. Dawson and Coultrap, "Price indices in contracts," 33 Mich. L. Rev. 685 (1935).

15. Escalator clauses may be related to yardsticks other than index numbers (market price of a single

The main field of index clauses are collective labor contracts.[16] Their use has been widespread in Australia,[17] France,[18] and, to a lesser extent in the United States [19] and other countries.[20] Under such an arrangement changes of index numbers may either react automatically upon wages, or they may merely give rise to renegotiation (re-opening). In either case, a "tolerance" clause—precluding the relevance of changes below a fixed minimum—is common. Particularly, automatic repercussions upon wages may be restricted by the provision that variations should be given legal effect only if rising above a certain minimum (say 3%). In the latter case wages under the impact of index number variations would "jump" not "slide." Even if so restricted, index clause automatism pure and simple is not much favored because its operation is crude and laborious. Use of index numbers in labor contracts is becoming more and more refined and elaborate.[21] While they are, and have always been,[22] a normal element in labor arbitration,[23] there, too, they are ordinarily not the only

commodity; appraisal of change of living cost by a committee, etc.)

16. R. Thomas, *L'Echelle Mobile des Salaires* (thesis, Paris, 1938), considering also developments in several non-French countries. Valuable though the Thomas study is, a more comprehensive inquiry, especially into the American situation, is sadly lacking.

17. Cf. *Commonwealth Arbitration Reports*, passim; *Labour Reports* issued annually by the Commonwealth Bureau of Census and Statistics (Canberra), *passim*.

18. R. Thomas, *supra*, n. 16, especially at pp. 113 *et seq*.

19. U.S.Dept. of Labor, Bureau of Labor Statistics, *Cost-of-Living Wage Adjustment Clauses*, 1948; *id.*, *Adjustments of Wages to Changes in Cost of Living*, 1946 (both mimeographed); Bureau of National Affairs, *Collective Bargaining Contracts* (1941) 604. Material also in Prentice-Hall, *Labor Equipment* (loose-leaf series), vol. IV, "Union contracts and collective bargaining practice," #50333, and vol. V, "Labor arbitration;" Prentice-Hall, *American Labor Cases* 1947–48.

20. For instance, in Germany during the earlier part of the great inflation 1918–1923. Later index clauses could not keep pace with galloping inflation. R. Thomas, 62.

21. See the publications of the U.S. Labor Dept., *supra*, n. 19, and R. Thomas, 131. The U. S. Bureau of Labor Statistics provides local index numbers for approximately 40 cities.

22. The comprehensive study by E. B. Carr "*The Use of Cost-of-Living Figures in Wage Adjustments*", Bureau of Labor Statistics *Bulletin No. 369* (1925), is mainly concerned with this subject.

23. See, e.g., Prentice-Hall, *Labor Arbitration Reports*, VII, 20 (*N.Y. Water Service Corp.*, 1947), and Vol. VIII, 9 (*New Jersey Telephone Co.*, 1947). Cf. also Dawson and Coultrap, *supra*, n. 14, at 693, and Irving Fisher, *Stable Money* (1934) 388. The same practice is common in Australia, the Commonwealth Court of Conciliation and Arbitration being in the lead. Illustrative

decisive factor. A French law of March 4, 1938, on conciliation and arbitration proceeding makes the official index numbers primarily—though not exclusively—determinative in labor arbitration ("tolerance" clause 5%).[24]

Apart from the labor field index clauses have been used in urban leases, especially French.[25] Of course, a prospective tenant will not be attracted by an arrangement whereby his rent will be automatically increased as soon as the general cost of living rises (in the case of commercial leases the situation may be different). In Germany after World War I, property and liability insurance was sometimes issued on an index basis. This device, however, was soon abandoned as too cumbersome and because insurance companies did not succeed in covering their risk by a corresponding investment.[26] One might expect to find index clauses also in maintenance, pension, and like contracts, and perhaps in long-term contracts for the delivery of electric power, etc., yet judicial or other records thereof are very few.[27] An attempt to construe the gold clause of a maintenance contract as an index clause was rightly rejected.[28]

is *The Australian Workers Union* v. *The Commonwealth Railways Commissioner*, 49 C.L.R. 589 (High Court of Australia, 1933).

24. *Bulletin Législatif Dalloz* 1938, 134.

25. App.Paris, July 1, 1931, *Gazette du Palais* 1931 II 886 [lease by the *Société Biarritz-Carlton Hotel* for a rent varying according to index numbers, of fr. 25,000, but not less than fr. 22,000]; App. Colmar, Feb. 26, 1932, *Revue Juridique d'Alsace et de Lorraine* 1932, 524, and decisions of lower courts collected by Hubert, *Sirey* 1930 I(1), 2. See App. Douai, *infra*, n. 34. Watts, "Inflation clauses in mortgages and loans," 4 *Australian Law Journal* 315, 318 (1931) quotes a lease clause based on the Quarterly Summary of Australian Statistics.

26. See Manes, *Versicherungslexikon* (8th ed., 1930) 1836.

27. App. Paris, March 26, 1945 in Sirey, *Chronique Bimensuelle* 1945, 43 deals with a sliding scale based primarily on index numbers and providing for the adjustment of a life annuity to changing conditions.

In a case decided by the Court Torino, May 22, 1934, *R.D.Comm.* 1935 II 532, 569, the plaintiff had obligated himself to supply the defendant with electric power, the rate to be computed on the basis of an average to be struck between the sterling price of the lira and the wholesale index figures prepared by the Milan Chamber of Commerce.

28. Supreme Court of Czechoslovakia, June 11, 1937, *Z.A.I.P.* 1937, 705, but in another decision of the same date the court surprisingly interpreted as an index clause the agreement to pay maintenance in terms of United States dollars. *Ibid.* 1937, 704. In accord with the above text, Court Padova, Feb. 1, 1938, *Il Foro delle Venezie* 1938, 304.

A remarkable experiment was undertaken by Professor Irving Fisher, one of the sponsors of the "tabular standard." In 1925 he caused the Rand Cardex Company of Buffalo to issue bonds promising the holder "such sum of money as shall possess the present purchasing power of one thousand dollars ($1,000) with interest thereon at the rate of seven per cent per annum, payable quarterly on January 1, April 1, July 1 and October 1, in such sums as shall, at the respective times of payment, equal in purchasing power one and seventy-five one-hundredths per cent. (1.75%) of said purchasing power of one thousand dollars ($1,000), all to be based upon an index number of the prices of commodities . . . ." [29] The index number employed was that for wholesale prices of the U. S. Bureau of Labor Statistics, and applied as of January 1, April 1, July 1, October 1, the quarterly due dates, each such index number being a three months' average.[30] Some years later the index bonds were replaced by ordinary bonds and by preferred stock,[31] the Rand Cardex Company having merged with another enterprise. Since then the index bond has disappeared from the American bond market.

In international relations index clauses are extremely rare. Interesting instances are the yearly United States-Cuba sugar purchase agreements.[32]

29. See *The Annalist*, Nov. 13, 1925, at 603.

30. *Ibid.* at 604.

31. Fisher, *supra*, n. 23, at 112. The same author, at 388, remarks that "a few analogous types have been used by other commercial companies," but he does not give particulars. Nor are other instances mentioned elsewhere.

32. For information on the text of the contract the writer is indebted to the United States Department of Agriculture. The pertinent provisions in the 1946 and 1947 Cuban Crops Purchase and Sale Contract for the 1946 crop read as follows (similar clauses have been stipulated for later crops):

CONTRACT entered into this sixteenth day of July, 1946, in the City of Habana, Republic of Cuba, by and between Commodity Credit Corporation, a corporate agency of the United States of America . . . (hereinafter called "Commodity"); and the Instituto Cubano de Estabilización del Azúcar (Cuban Sugar Stabilization Institute), a juridical entity of Cuban nationality . . . (hereinafter called the "Institute") . . . .

Art. 1. *Quantity Purchased.*—The Institute hereby agrees to sell to Commodity and Commodity hereby agrees to purchase the 1946 and 1947 Cuban sugar crops in the form of raw sugar, less 350,000 long tons in 1946 and 350,000 long tons in 1947 for Cuban local consumption . . . 250,000 long tons in 1946 and 300,000 long tons in 1947 for free export from Cuba, . . . upon the terms and conditions hereinafter set forth in this Contract . . . .

Art. 4. *Price.*—(a) The basic minimum price of raw sugar purchased hereunder of the 1946 crop shall be

While index clauses have not the rigid, as it were, inhuman, property of gold clauses, they have a very similar inflationary effect. Also, they unload, like gold clauses, the whole burden of monetary depreciation on the debtor's shoulders.[33] French courts have more than others wrestled with this problem without settling the law. Repeatedly they have held index clauses good [34]

the sum of: (1) 3.675 cents, United States currency, per pound, basis 96 degrees polarization, f. o. b. customary port of loading for each mill in Cuba . . . (2) The difference between .75 cent per pound and the amount of any United States import duty on Cuban raw sugar which is less than .75 cent per pound . . . .

(c) Increases in living costs or in foodstuff prices will be taken into consideration for increasing the basic minimum price in the following manner:

(1) If for any quarter or quarters in the calendar year 1946 the average of the monthly food indices published in the "Consumers Price Index and Retail Price of Food," issued monthly by the Bureau of Labor Statistics of the United States Department of Labor, exceeds 140.27 (which is the average of such indices for the last three months of the calendar year 1945) by 2 percent or more, then with respect to each such quarter the basic minimum price of one-fourth of the total quantity of raw sugar of the 1946 crop purchased hereunder shall be increased . . . by the full percentage of 140.27 by which such average exceeds 140.27 . . . .

(2) If for any quarter or quarters of the calendar year 1946 the average of the monthly indices of living costs published in the "Consumers Price Index and Retail Price of Food" . . . exceeds 129.37 (which is the average of such indices for the last three months of the calendar year 1945) by 2 percent or more, then with respect to each such quarter the basic minimum price of one-fourth of the total quantity of raw sugar of the 1946 crop purchased hereunder shall be increased . . . by the full percentage of 129.37 by which such average exceeds 129.37. . . .

See, *infra*, n. 40.

33. It is true that the index curves and the gold price curves do not coincide, as ordinarily the latter rises more steeply upward. Cf. e.g., Bresciani-Turoni, *The Economics of Inflation* (1937) 443, 444 (Tables), giving for the period of the German inflation 1918–1923 wholesale price and cost of living index numbers in terms of gold. Still the burden of the index clause on the debtor is heavy enough.

34. See cases in ns. 25, 27 (App. Paris) and Trib. civ. Strasbourg, June 14, 1933, *Revue Juridique d'Alsace et de Lorraine*, 1933, 535, upholding the index clause in a contract calling for a payment by long-time instalments. App. Douai, Nov. 27, 1928, *Revue du Droit Pancaire*, 1930, 176, held invalid a lease clause based on the Paris living cost index, pointing out that this index, being only approximately fixed, is too uncertain. Apparently no general importance can be attached to the decision. Still it is a warning against resorting to an ill-defined standard in a desire to adapt the contract closely to

even where the clause was framed solely for the contingency of depreciation,[35] but in a more recent lease case the *Cour de Cassation* has invalidated the clause.[36] Legislation against gold clauses generally does not affect index clauses. This is true also of the Joint Resolution.[37] To be sure the statute has been expanded to the breaking point [38] by the courts but so far the decisions have always been hinged on a hook, however frail, in the phrasing of the Joint Resolution. By no stretch of the imagination, however, can index clauses be held to "require payment in gold of a particular kind of coin or currency or in an amount in money of the United States measured thereby." [39] It is therefore unlikely that index clauses will be invalidated by the courts [40] and certainly not in the labor field where they constitute a kind of legal custom. A law of the U. S. Military Government of the German occupation zone of July 17, 1947,[41] expressly invalidates all "stabilizing clauses" including clauses correlating the mark to a "sliding scale or in any other way to the prices of fine gold . . . or to the price of other precious metals, merchandise, securities or currencies other than German . . . ." [42] But this provision is isolated in legislative practice and rather brings into relief the narrower scope of the Joint Resolution. Nevertheless, as long as the Supreme Court has not spoken, doubts regarding the validity of index clauses under American law remain.

local conditions. Of course, index clauses cannot prevail over emergency legislation prescribing maximum rents. This has repeatedly been held by French courts. Decisions are listed in *Semaine Judiciaire* 1938, 695.

While there are no Belgian cases squarely in point, App. Gent., April 12, 1922, Piret, *supra*, p. 292, n. 52, at 233, found no fault with a contract of sale entitling the seller to an increase of the price proportional to a general rise of salaries and of the market for raw materials.

35. App. Colmar, *supra*, n. 25. The minimum clause of the *Biarritz-Carlton* case, *supra*, n. 25, likewise amounted, theoretically at least, to a discrimination against the debtor.

36. Cass. July 24, 1939, *Gazette des Tribunaux* of Feb. 3, 1940. Trib. comm. Seine Nov. 12, 1940, *Gazette du Palais, Recueil* 1940 I 59 invalidated an index clause attached to a loan, while at the same time upholding the contract.

37. Cf. Dach, "Validity of price-index clauses under the gold coin joint resolution," 12 Geo.Wash.L. Rev. 328 (1945).

38. Especially by Guaranty Trust Co. of New York v. Henwood, 307 U.S. 247, 59 S.Ct. 847, 83 L.Ed. 1266 (1939), *infra*, 435.

39. *Supra*, p. 282, n. 6.

40. The United States-Cuba sugar agreement, *supra*, n. 32 seems to indicate that the two governments consider index clauses valid.

41. *Supra*, p. 281, n. 5.

42. This broad language covers pure

Another handicap of the clauses results from the fact that bonds, promissory notes and other commercial paper carrying an index clause are not "negotiable instruments" since they do not provide for payment of a "sum certain." [43] A buyer of the paper, therefore, does not benefit from the protection granted by the law to a holder in due course of a negotiable instrument against claims of former holders and against hidden defenses of the maker.[44] Bonds of the Rand Cardex type, therefore, are unsuited to negotiation and are of reduced value even for investment purposes. It is not likely that this difficulty can be overcome by novel clauses providing for negotiability.[45] Obligations in terms of index numbers would also lack the important procedural advantages reserved for debts of fixed amounts.[46]

commodity clauses also, but generally such clauses are much less likely than gold clauses to provoke adverse legislation or judicial action. They occur only in special situations presenting in one way or another particular justification for their use, and they hardly hold a major inflationary threat.

43. *Uniform Negotiable Instruments Law*, § 1, no. 2. See Nebolsine, "The Gold Clause in private contracts", 42 Yale L.J. 1051, 1093 (1933); Dawson and Coultrap, *supra*, n. 14.

44. *Contra:* Dawson and Coultrap, *loc. cit.*, giving full references to decisions and legal literature. The cases cited by the authors for their views hardly support their position. In *Morgan Brothers* v. *Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S.W. 1019 (1915), a debtor's waiver of equitable defenses against an innocent holder of the instrument was held good. However, it is open to doubt whether the holder under such a waiver would be in the same position as to defenses raised by the debtor, as he would be under the Negotiable Instruments Law. Similar is *Anglo-California Trust Co.* v. *Hall*, 61 Utah 223, 221 P. 991 (1922), where an even more limited waiver was involved. In *Gray* v. *Gardner*, 12 D. & C. (Pa.) 449 (1929), decided by a lower court, the note sued upon "met all requirements of negotiability", only a certain "shadow of doubt" was eliminated, in the court's opinion, by the statement on the note that it should be held negotiable. Yet negotiability, because of its peril to innocent persons should be limited to definite and clear legal characteristics.

45. Generally negotiability is created by custom or statute rather than by contract, *Enoch* v. *Brandon* 249 N.Y. 263, 266, 164 N.E. 45 (1928); Code of Commercial Law, *supra*, p. 251, n. 26, Art. III § 102(2). The same view prevails outside the United States, see, *e.g.*, *Reichsgericht* April 20, 1909, *R.G.Z.* 71, 30; Feb. 9, 1921 *ibid.* 101, 297. However, under N. Y. Personal Property Law, art. 8, § 262, apparently bonds may be made negotiable by agreement. *Quaere* whether such negotiability would be recognized outside New York.

46. *Supra*, p. 151, n. 66. As to German law, the point has been elaborated in the writer's *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928) 33.

Criticism of index clauses has also been voiced from other points of view.[47] Ceiling prices and black markets have been particularly instrumental in making people aware of the imperfections of index numbers. Nevertheless there is no better yardstick of purchasing power—which in itself is an elusive if indispensable notion. Index numbers, therefore, will play, as before, an important role in labor contracts and labor arbitration. Outside the labor field the use of index numbers is likely to be confined to isolated situations. In the light of experience the heralding of the "tabular standard" by outstanding economists was a distinct aberration. The mistake would not have assumed such a large dimension had the legal implications of the subject been heeded.

47. See, e.g. by Nebolsine, in the article *supra*, n. 43.

BOOK TWO

MONEY IN THE INTERNATIONAL LAW — PRIVATE AND PUBLIC

Chapter 1

FOREIGN MONEY

Section 21

HISTORICAL

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I. Migration of Coins

Though money is in itself a national phenomenon it has from its beginning exhibited a conspicuously international behavior. The first coins—made in the early seventh century B. C. by the Lydians from electron, a natural mixture of gold and silver—were, it is believed,[1] used principally in foreign trade. When coining was improved in the sixth century by the Greek city of Aegina on the island of the same name, Aeginician peddlers and traders took the coin abroad in the pursuance of their business.[2] The coins became known throughout Greece and the literals of the Black Sea. The migratory feature of coins proved longevous. To give an instance from late antiquity, the golden solidus of Emperor Constantine (A.D. 306–337), and his successors, has been found in treasure troves from the Baltic Sea to the Sahara.[3] As a matter of fact, migration of coins persisted until the 19th Century, and sporadically beyond. During the Dark Ages following the collapse of the Roman Empire, barter economy prevailed, with a spotty use of small silver coins (denarii, the "age

1. A. B. Burns, *Money and Monetary Policy in Early Times* (1927) 43.

2. *Ibid.*, at 44.

3. *Ibid.*, at 243, 279, 436; Pauly-Wissowa, *Real-Encyclopaedie der Classischen Altertumswissenschaft*, "Solidus."

of the deniers").[4] It was not until the 13th Century that a more diversified currency emerged. But this was then the era of utter dismemberment of political power, resulting, perforce, in monetary imbroglio. In the first centuries of modern times the gradually forming national states began to press toward unitary order in monetary relations, but the malpractices of absolutism and the frequency of wars impeded progress. Monetary confusion persisted, favoring the migration, especially in the case of such renowned gold coins as the Florentine florin and the Venetian ducat. Moreover, the scarcity of coins in one country was apt to cause a drain upon the currency of others. In the American colonies of the 17th and 18th centuries the coins in circulation were almost exclusively foreign.[5] In conclusion, one might well assert with Sombart[6] that monetary circulation from the 13th to the 18th century bore conspicuously an international character. While in the Eastern hemisphere migratory conditions persisted beyond that period, in the Western countries money was effectively "nationalized" during the 19th century.

II. Legal Effects of Migration

The international character of money was necessarily reflected by the law. It is true that in Germany during the Middle Ages, the local coining potentates often insisted upon the rule that the "denier is valid only where coined."[7] But a custom more generally observed within the Empire was that a creditor must take money other than that contracted for, especially foreign money provided he did not suffer prejudice therefrom. This rule, popularized in the adage *pecunia una pro alia solvi potest,* was sponsored particularly by Bartolus (1314–1357) whose influence here as elsewhere proved great and lasting.[8] In its application the

4. Sombart, *Der Moderne Kapitalismus,* I (1921), 413 ["*Zeitalter der Pfennige*"].

5. *Infra,* sec. 40 III.

6. *Supra,* at 409. For a scholarly study of foreign exchange transactions of the late medieval and early modern period, see De Roover, "Early accounting problems of foreign exchange," *Accounting Review,* 1944, 381.

7. "*Der Heller gilt nur wo er geschlagen wird*". Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2d ed., 1926 279).

8. Endemann, *Studien in der Romanisch-Kanonistischen Wirtschafts- und Rechtslehre,* II (1883), 213; Ascarelli, *La Moneta* (1928) 17; id., *Saggi Giuridici* (1949) 237, 242. The text of Bartolus' main utterance on the subject (Commentary at D. XLVI, 99, 3 and 6), has been translated by Eder. "The gold clauses in the lights of history," Geo.L.J. XXIII (1935), 369, n. 26. The Imperial Coinage Ordinance *(Reichsmünzordnung)* of 1559 did not adopt the rule mentioned above; in fact, it prohibited, with certain exceptions, the importation

relative value of coins was determined on the basis of their metal content (intrinsic value). The use of this test was facilitated by market quotations and customary estimates, which, for instance, in the case of the florin, enjoyed international recognition.[9] The forces behind the estimates were strong enough to defeat Edward III in England, when in 1343 he tried to free himself of the pressure of the continental valuation of the florin.[10] A special usage prevailed in respect to drafts on the great international fairs held during the 16th and 17th centuries in Italy and the Provence. The drafts were couched in terms of *scuti marcharum* to be discharged in gold coins according to current mercantile evaluation.[11]

Moreover, local rulers themselves often made foreign coins current within their territories. Ordinances of the Dutch States General of 1606, provided official estimates for about 1,000 different coins illustrated by engravings for the benefit of the public.[12] The system of *moneta imaginaria* offered an excellent expedient for incorporating desirable foreign coins into the officially rated media of circulation. Even in England during the 16th century, certain French and other foreign gold coins were recognized as lawful currencies.[13] In the American colonies the Spanish peso and other non-English coins were officially rated in terms of shillings and pence.[14] To turn to more recent times, the English sovereign was made legal tender in Switzerland in 1870,[15] in Argentina in 1887,[16] and in India in 1893.[17] In 1918,

of foreign coins. Cf. *Neue und Vollständige Sammlung der Reichsabschiede* III (1747) 357. Ascarelli's statement to the contrary (*La Moneta* [1928] 23) is not correct.

9. Friedensburg, *Deutsche Münzgeschichte* [*in Grundriss der Geschichtswissenschaft*, ed. by Meister, I(4),] 2d ed., 1912, at 125, remarks that until the establishment of the German national currency in 1873 coins of the most varied centuries and territories were circulating at a purely customary rate in Bavaria.

10. Feavearyear, *The Pound Sterling* (1931) 26.

11. *Supra*, p. 232.

12. W. A. Shaw, *The History of Currency 1252 to 1894* (3d ed., 1896) 78.

13. *Wade's Case*, 5 Co. Rep. 114a, 77 Eng. Rep. 232 (1601) is in point. [Spanish and French coins.]

14. *Infra*, sec. 40 III.

15. Blaum, *Das Geldwesen der Schweiz* [*Strassburger Abhandlungen*, no. 24] (1908) 108.

16. *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.*, 10 Lloyds L.R. 703 (H. of L., 1922) pointing out that despite this Argentine rule, "pounds" payable in Buenos Aires did not mean "sovereigns." Same: *Ellawood* v. *Ford and Co.*, 12 ibid. 347 (K.B., 1922) and *Williams* and *Mordey* v. *Muller and Co., Ltd.*, 18 *ibid.* 50 (K.B., 1924).

17. References *supra*, p. 125, n. 39.

Mexico conferred that privilege on American and a number of other non-Mexican gold coins.[18] Incorporation into the domestic system has also been accomplished by imparting public receivability to foreign coin, as was done by the Latin Monetary Union in respect to Union coins of member countries.[19] Finally, foreign money may become current in a certain territory without any governmental assistance, the chief illustration being the circulation of foreign coin in frontier districts. In all of these situations, what is primarily foreign money becomes domestic money; in the third case, of course, only within the frontier district.

Criminal law followed the example of private law. Since the fourteenth century counterfeiting of foreign coins came to be a crime under local statutes,[20] as such counterfeiting evidently did harm to domestic interests. The Church, also, emphasizing the moral point of view, demanded and enforced punishment of all counterfeiters indiscriminately.[21] We are thus confronted with the first large-scale emergence of "international penal law."

Still, all this does not amount to international law in the more familiar meaning, viz., to law among states. When in the early seventeenth century the famous Spanish theologian, Francisco Suarez, referred to the universal use of money as to an instance of the operation of the "law of nations," [22] he had, in mind, perhaps, the law of nations in the sense of universal law.[23] The connection of the monetary matter with international law was definitely asserted by the German jurist, Samuel Rachel, who wrote in the late 17th century.[24] He relied on the international circulation of many coins, mentioning especially the Turkish ducat. His argument was mistaken, however. Acceptance of foreign coins was in the first place a matter of expediency because of a common trust in the full weight and fineness of certain coins.

18. Decrees of May 14, 1918, *Diario Official* 1918, 171, 172. American gold coins were made legal tender also in Canada (*Tate's Modern Cambist* [28th ed., 1929] 505) and in the West Indies (demonetized there by Order in Council, Nov. 9, 1935, S.R. & O. 1935, 216).

19. *Infra*, sec. 35 II.

20. Jos. Kohler, *Das Strafrecht der Italienischen Statuten* (1897) 575.

21. This was first done by the First Lateran Council in 1123. Details in G. Salvioli, *Il Diritto Monetario Italiano dalla Caduta dell' Impero Romano ai Nostri Giorni* [reprint from Encyclopedia Italiana X] (1889) 77.

22. *De Legibus ac Deo Legislatore*, I, chap. 19, sec. 10.

23. Suarez was familiar with both meanings which had been confounded by earlier writers. Cf. the writer's *A Concise History of the Law of Nations* (1947) 66, 71.

24. *De Jure Naturae et Gentium, Dissertatio Altera* (1676), [tr. by Bate in *Classics of International Law*, 1916], 216. Cf. *Concise History*, supra, n. 23, at 122.

To the extent, however, that acceptance of foreign coins was made obligatory, the reason was commercial custom or municipal legislation rather than a rule obtaining among states or even a rule of universal law. In later doctrinal discussion Rachel's argument has not been repeated.

III. Trade Coins [25]

By trade coins one understands coins made for foreign circulation. The oldest [26] and most famous trade coin, the Austrian *Maria-Theresa thaler* [27] first coined in 1780, has long been used in the Red Sea countries, particularly in Abyssinia; its original design, including the inscription of the year 1780, has been preserved unchanged because any change would have excited the suspicion of the illiterate natives. Recently the *Maria-Theresa thaler* has given rise to a remarkable problem of international law. During the Italian-Abyssinian war (1935–36) Austria ceded the dies of these coins to Italy, to be employed in the manufacture of new *Maria-Theresa thalers* for use in Abyssinia.[28] After the Abyssinian defeat, Italy incorporated the *thalers* into the new Abyssinian monetary system at a value exceeding their intrinsic worth.[29] Thereupon private firms proceeded to manufacture the *thalers* in England without objection on the part of the English government. The latter took the position that cession of the coinage privilege by Austria was ineffective and had resulted in its abandonment.[30] It seems very questionable indeed whether a sovereign can validly cede distinctive emblems, such as those appearing on his coins, to another sovereign for exclusive use by the latter.

Another celebrated trade coin is the Mexican trade dollar. The Spanish conquerors established a mint in Mexico as early as 1535.

25. See *Palgrave's Dictionary of Political Economy*, III (1926), "Trade Coins"; *Conrads Handwörterbuch der Staatswissenschaften*, VI (1910) Art. "*Münzwesen*," p. 817.

26. Laughlin, *Money, Credit and Prices* I (2nd ed., 1931), 61, mentions the Roman *victoriatus* of the third century B.C. as an early trade coin. Still, the *victoriatus* seems to have been rather a colonial coin. Mommsen, *Das Römische Münzwesen* (1860) 391.

27. See the interesting Paris thesis by M. Fischel, *Le Thaler de Marie-Thérèse* (1912).

28. Italy called in her silver for this purpose because she had no access, or intended to avoid an appeal, to the English silver market. See Hans in *Währung und Wirtschaft* [a periodical], 1935, 187; 1936, 202.

29. The Maria-Theresa thaler is still mentioned as Abyssinian currency in Ital.Cass., June 19, 1940, *Giurisprudenza Italiana* 1940 I (1) 793 [conversion into lire at the official Italian rate.]

30. *Währung und Wirtschaft*, 1937, 176, citing *Rassegna Economica dell'Africa Italiana* of July, 1937.

The vast silver deposits of that country permitted such a tremendous output of silver coins that the peso, later in English called silver "dollar", became the main medium of payment for imports into the Spanish Empire.[31] Always kept in full weight and fineness, the Spanish-Mexican silver dollar flooded England's American colonies in the 18th century and penetrated via the Spanish Philippines and in other ways the Far East, particularly the Chinese ports. When the Mexican Republic was established in 1823, the circulation of the Mexican dollar persisted and increased, but the Mexican government, passing through the same experience as the Austrian government with regard to the *Maria-Theresa thaler,* had to use for the foreign circulation the coin pattern of the Royal era ("old die"). In Chinese relations "dollar" meant during the 19th century and beyond, Mexican trade dollar rather than United States dollar. An instance is the historically important Anglo-Chinese Treaty of 1842 which—besides opening certain Chinese ports to European commerce—imposed upon China the payment of an indemnity of 25,000,000 "dollars" for damages inflicted in the "Opium War." [32] So popular was the Mexican trade dollar in Eastern Asia, that commercial accounts were conducted on its basis, a fact giving their holders much trouble in the period of silver depreciation.[33]

In 1873 the United States made an attempt to dislodge the Mexican trade dollar from the Far East by creating a "trade dollar" of its own weighing 420 grains of fine silver,[34] whereas a Mexican dollar contained 416.5 grains. The plan failed sadly,[35] but the

31. Cf. Laughlin, I, 428.

32. Hertlet, *Treaties and Conventions,* VI (1898), 221.

33. In *Grunwald* v. *Freese,* 34 Pac. 73 (Cal., 1893), a suit was brought for the balance of such a dollar account. When the balance was due in 1890, the Mexican trade dollar was valued at 98-1/2 cents; at the time of the initiation of the proceeding, it was worth 83 cents and at the time of the trial (the judgment was rendered in August, 1893) 74–75 cents, owing to the depreciation of the silver. Monetary units in that period did not fluctuate to a similar extent.

The Mexican trade dollar still appears in *Bracher* v. *U. S.,* 68 Treas. Dec. 404 (Customs Court, 1935); *Dyer* v. *U. S.,* 2 *Customs Decisions* 462 (1939), both customs cases on Chinese goods; and Cass., Feb. 12, 1880, *D.P.* 1880 I 166, a Cochin-China case. The *Bracher* case points out that the Mexican trade dollar was different from, though at par with, the "Tsientsin" dollar (*Yuan,* the official Chinese dollar).

34. 17 Stat. 424, §§ 15, 21. See Carothers, *Fractional Money* (1930) 275.

35. What really happened in Eastern Asia was that the American dollar "went into the melting pot." Morse, "Currency in China," *Journal of the North China Branch of the Royal Asiatic Society,* XXXVIII (1907), 56.

United States trade dollar attained a certain notoriety in the legal field. Notwithstanding its quality as a trade coin, it was made legal tender by an Act of 1873, while coinage of the old silver dollar was discontinued. The trade dollar was then worth more than a dollar, so its legal tender quality was considered a mere formality, but when silver depreciated the free coinage of trade dollars permitted by the law of 1873 began to operate and the trade dollar made its shocking appearance in American payments.[36] It proved necessary to abrogate its legal-tender and free-coinage features, and finally the trade dollar was eliminated from circulation by way of redemption.[37] These developments are intertwined with other phases of American monetary history.[38]

Trade coins have sometimes been emitted also by other countries.[39]

IV. Adoption of Foreign Monetary Devices

Much progress in the international development of monetary institutions has been achieved when in the course of history a meritorious example set by one country was followed by others without treaty or other legal compulsion. The outstanding instance is the spread of the gold standard, by independent acts of municipal legislation, from England to Germany, the United States, France and other commercially advanced countries. In the monetary field, at least, this was the greatest accomplishment of international cooperation ever attained. Another and very old procedure is the adoption of coin types outside the country of origin. Thus gold coins of the type of Emperor Constantine's *solidus* were issued by numerous Christian and even Moslem rulers up to the seventh or eighth century.[40] In the later Middle Ages and in the beginning of modern times, the success of the florin, the ducat, and other coins, caused many rulers to make coins of exactly the same pattern. Such one-sided procedure was not considered illicit. The Emperor himself, in granting a coinage privilege, would condition it on the adoption of the

36. Hepburn, *A History of Currency in the United States* (1915) 274.

37. Joint Resolution of July 22, 1876, 19 Stat. 215.

38. *Infra*, sec. 43 I.

39. In 1895 the French authorities issued a silver trade-piaster (piaster = peso) for French Indo-China, but the coin was early made a local legal tender and finally drawn into the debacle of the French franc. See Cass., April 4, 1938, *Sirey* 1938 I 188; Dec. 26, 1938, *Gazette du Palais*, Feb. 17, 1939, with annotation. Cf. also Arnauné, *La Monnaie, le Crédit et le Change* (4th ed., 1909) 327.

40. Cf. Trimborn, *Der Weltwährungsgedanke* (1931) 14 with references.

Florentine florin standard.[41] Only deceptive imitations were unlawful, but the range of lawful imitation was rather leniently drawn.[42]

In modern times the most conspicuous instance of monetary assimilation is probably the adoption of the franc standard of the Latin Monetary Union by a number of non-member countries, such as Spain, Serbia and Roumania.[43] The idea was to facilitate monetary intercourse with the countries of the Union without submitting to the obligations stipulated by the Union treaty. Of course, such assimilative processes are found in numerous international relations of a non-monetary kind also.

Section 22

THE MODERN LAW ON FOREIGN MONEY

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I. Foreign Money—A Commodity [1]

A coin or a note functions as money only within the territory in which that currency customarily circulates; elsewhere the coin or note commonly becomes a commodity. Therefore foreign money [2] does not fall within the rule protecting *bona fide* holders of money, except that foreign bank notes might be covered by the rule governing negotiable instruments.[3] In fact, no reasonable justification exists for extraordinary protection in respect to

41. Inama-Sternegg, *Deutsche Wirtschaftsgeschichte des Mittelalters*, III, part 2 (1901), 411.

42. Luschin von Ebengreuth, *supra* n. 7, at 59; G. Salvioli, *supra*, n. 21, at 7, n. 4; Nagl, *supra*, p. 37, n. 33, at 213.

43. See, *e.g.*, *Encyclopedia of the Social Sciences*, "Monetary Unions".

1. Under present conditions this and the following subsections must be read in the light of the restrictions discussed in subsection V.

2. In some word combinations such as "rate of exchange" *infra*, p. 335, the term "exchange"—originally referring to foreign bills of exchange—has come to mean foreign money, or more generally, international media of payment, including gold. In French and German the term *dévises*, *Devisen*—in the past likewise referring to foreign bills of exchange—has assumed the same significance.

3. *Brown* v. *Perera*, next note; *Reichsgericht*, May 28, 1924, *R.G.Z.* 108, 280.

foreign coins or notes. Public policy does not foster their circulation and they can be much more easily identified than domestic money.[4]

Where foreign currency is bought with or sold for, domestic money, a real sale takes place; neither a barter nor a simple exchange of money for money has occurred. A consequence of this particular type of "commodity theory" bears upon damages in the case of breach of contract. While in the case of a domestic currency debt the creditor, upon a breach of contract, is merely entitled to interest,[5] he may sue for the difference in market prices where his debtor breaches a contract calling for the delivery of foreign currency.[6] The rule has also been laid down that import and export regulations regarding "merchandise" apply to foreign money; and during the years following World War I, statutory prohibitions of the import of "merchandise" without a license were used to bar the influx of Russian ruble notes.[7]

4. This rule has frequently been announced by the courts. See, *e. g.*, *Leavitt v. De Launy*, 4 N.Y. 363 (1850); *Gross* v. *Mendel*, 171 App. Div. 237, 157 N.Y.S. 357 (1916), *aff'd*, 225 N.Y. 633, 121 N.E. 871 (1918); *S. S. Celia* v. *S. S. Volturno*, [1921] 2 A.C. 544, 563 (H. of L.); *Richard* v. *American Union Bank*, 253 N.Y. 166, 170 N.E. 532 (1930); *Anglo-Continentale Treuhand A. G.* v. *St. Louis Southwestern R. Co.*, 81 F.2d 11 (C.C.A.2d, 1936); *Reichsgericht*, Sept. 25, 1919, *R.G.Z.* 96, 265; May 28, 1924, *ibid.* 108, 279; App. Hamburg, Oct. 12, 1920, *Rechtsprechung der Oberlandesgerichte* XLI 214. A contract to sell foreign money has been held to be a sale of goods subject to the Sales Act. *Reisfeld* v. *Jacobs*, 107 Misc. 1, 176 N.Y.S. 223 (1919); *Melzer* v. *Zimmerman*, 118 Misc. 407, 194 N.Y. S. 222 (1922), *aff'd*, 205 App.Div. 886, 198 N.Y.S. 932 (1923). In *Reisfeld* v. *Jacobs*, notes of the Imperial Bank of Russia bought in 1918 were declared to be commodities within the Statute of Frauds, as not passing *anywhere* as money (Italics added). This reasoning was redundant. In *Brown* v. *Perera*, 176 N.Y.S. 215 (1918), *aff'd*, 182 App.Div. 922, the referee, with a great show of learning and marshaling of vast material, tried to justify the opposite theory, ignoring, however, the obvious diversities in the social significance of domestic and foreign money.

A thorough study of the foreign money-commodity problem is presented by Neumeyer, *Internationales Vermaltungsrecht* III, part 2 [III] (1930), 128, with references to a vast, preponderantly German and Italian literature. It should be noted that writers frequently confound the general (French) commodity doctrine of money, *supra*, p. 22, with the special commodity doctrine related to *foreign* currency.

5. *Infra*, n. 159. Contrariwise, national money, traded in abroad, must be treated as a commodity, *supra*, p. 24, n. 12.

6. See *Richard* v. *American Union Bank*, 253 N.Y. 166, 170 N.E. 532 (1930).

7. App. Paris, May 30, 1921, *Sirey* 1921 II 89; *Reichswirtschaftsgericht*, March 19, 1921, *J.W.* 1921, 651; Dec. 2, 1922, *ibid.* 1924, 726; as to customs: Criminal Court of

Application of the law of sales assumes a special significance where counterfeit foreign money is delivered by a seller—a rather frequent situation in countries with bad currencies and a consequently heavy demand for foreign money (in the periods of the two World Wars particularly for American dollars). Under the American law of sales the rule "caveat emptor" does not apply to the situation at hand, since the purchaser did not receive a mere defective note but rather a scrap of paper.[8] Even if the seller of the counterfeit note acted in good faith the purchaser has the choice of recovering either the price paid by him, if he rescinds, or the value of the note at the time of the breach of contract, *viz.*, at the time when the foreign currency was to be delivered.[9] However, the recipient's rights are conditioned on his examining and returning the counterfeit note within a reasonably short time.[10] These norms might offer guidance also outside the United States.

The treatment of foreign money as a commodity is subject to important qualifications. First, where by law or custom such money is incorporated in the international monetary system, it

Avesnes, Dec. 9, 1924, *D.H.* 1925, 94. *Contra*: *Reichsgericht*, July 14, 1921, *J.W.* 1922, 168. The Avesnes case turns on English pound notes.

8. This fact would constitute a "failure of consideration". A similar situation exists where a bill or note is sold and turns out to be invalid because of forgery or other reasons. *Meyer* v. *Richards*, 163 U.S. 385, 16 S.Ct. 1148, 41 L.Ed. 199 (1896); *Terry* v. *Bissell*, 26 Conn. 23 (1857); *Aldrich* v. *Jackson*, 5 R.I. 218 (1858). *Cf.* Uniform Negotiable Instruments Law, §§ 23, 65. See generally Williston, *Sales* (2d ed., 1924) sec. 600; Clark, *Contracts* (4th ed., 1931) 644. Under civil law, the rules limiting the seller's liability with regard to defective delivered goods cannot apply to counterfeit foreign money either. *Reichsgericht*, Sept. 23, 1922, *J.W.* 1923, 176; Austrian Supreme Court, June 28, 1921, *Die Rechtsprechung* IV (1913) 79; and for the case of a payment made in counterfeit notes, same court, Feb. 22, 1921, cited by Löbl, *ibid.*, 56.

9. Williston, *Sales* (2d ed., 1924) secs. 600, 656. In the case of counterfeit Federal Reserve notes sold in Germany to a German bank, the *Reichsgericht*, May 28, 1924, *R.G.Z.* 108, 279, denied the latter's claim because the sale involved only specific notes. This is clearly unsatisfactory.

10. To this extent the rules on counterfeit payments, *supra*, p. 97, apply; *Curcier* v. *Pennock*, 14 Serg. & R. (Pa.) 51 (1826). A special burden is even placed upon the recipient to use reasonable means of ascertaining the genuineness of foreign money before accepting it. *Rasst* v. *Morris*, 135 Md. 243, 108 A. 784 (1919). App. Hamburg, in the case cited *supra*, n. 4, dismissed a vendee's claim on the ground that a ten-day period stipulated by contract had elapsed. At the same time the Court pointed to the frequency of commercial customs requiring observation of such periods. Mostly, counterfeit dollar notes were involved.

must be placed on the same level as national money. Also, foreign money as mentioned before may circulate without any government's assistance as an ordinary medium of payment in border districts,[11] presenting an instance of a territorially restricted currency.[12]

Moreover, in some aspects foreign money must in a general way be looked upon as money (though not as national money). First of all, the obligation for the payment of a sum couched in terms of a foreign monetary unit is a monetary obligation, a "debt" rather than an obligation for the delivery of commodities.[13] A special situation prevails also in criminal law. The historic trend referred to above toward punishment of crimes committed with regard to foreign money has fully unfolded in modern times. All the penal codes make counterfeiting of foreign money a criminal offense although possibly under less severe penalties than those provided for counterfeiting the national money.[14] Remarkably, the Soviet Penal Code of 1926 [15] is among them, though as a rule Soviet legislation is not inclined to protect foreign interests. Furthermore, while crimes committed abroad are generally not punishable under national law, many codes provide an exception to this "territoriality principle" for monetary crimes committed abroad.[16] The explanation is that counterfeiting gangs operate from country to country and frequently shift the center of their activities.

11. *Brown* v. *Perera*, *supra*, n. 4, at 227. In Gibraltar Spanish money was still current recently. *Pyrmont, Ltd.* v. *Schott*, [1939] A.C. 145 (Pr. C., 1938).

12. *Supra*, p. 50. Regarding the effects of legal tender and *cours forcé* outside the country of origin, see *supra*, pp. 57, 268.

13. *Infra*, sec. 24 I.

14. See 35 Stat. 1117 (1909); 18 U.S.C. 478–483; 25 & 26 Geo. V, c. 25 (1935); 26 Geo. V and I Edw. VIII, c. 16 § 17(b) (1936); French Penal Code 132 *et seq.* (see also *infra*, p. 508, n. 28); German Penal Code 146 et seq.; Italian Penal Code of 1931, § 453 *et seq.*; Japanese Act of 1905, referred to in judgment of the Japanese Supreme Court of 1919, Lauterpacht, *Annual Digest of Public International Law Cases* 1919–1922, No. 15 [regarding counterfeit Kerensky rubles]. See also Harvard Law School "Research in International Law: Draft convention on jurisdiction with respect to crimes," 29 Am. Journ. Int. Law Supp., 561, 562 (1935), and Kohler, *supra*, p. 40, n. 45, at 214.

15. Penal Code of 1926, § 59(8).

16. Cf. *e. g.*, French Code of Criminal Procedure 7 [limited to counterfeiting of French money]; German Penal Code 4, par. 2(1); Italian Penal Code of 1931, sec. 7(2). See also Harvard Law School, *supra*, n. 14, at Art. 8.

Of particular interest is the case of the *United States* v. *Arjona* decided in 1887 by the Supreme Court of the United States.[17] The court took it to be a national obligation of sovereign states to enact provisions against the counterfeiting of foreign money, since disturbances of monetary circulation might affect international commercial intercourse. The court's theory based primarily on *Vattel* (1714–1767) is hardly sufficiently documented. True, since the Court was actuated by a desire to prove the constitutionality of the penal statute in point, the assumption of an international obligation offered a good foundation for an affirmative decision. Even so, there was hardly a need for the court's theory inasmuch as suppression of the counterfeiting of foreign coins is within the scope of "regulating commerce with foreign nations" [18] apart from any international obligation.

This is not to deny that efficient curbing of counterfeiting makes international cooperation desirable. Such cooperation was inaugurated in 1929, by the "International Convention for the Suppression of Counterfeiting of Currency," [19] under the auspices of the League of Nations. The Convention obligates the signatory powers to punish the fraudulent making or altering of currency, whether domestic or foreign, to establish central agencies for the investigation of counterfeiting, to exchange pertinent information and to extradite counterfeiters in case they cannot be prosecuted by the extraditing state because of the "territoriality" principle. Counterfeiters actuated by political motives are not exempt; in fact it was one of the main concerns of some of the signatory governments to deprive counterfeiters under all circumstances of the privileges accorded to political offenders.[20]

17. 120 U.S. 479, 7 S.Ct. 628, 30 L.Ed. 728 (1887).

18. Constitution of the United States Art. I sec. 8 cl. 3.

19. League of Nations, *Treaty Series* CXII 372. The Proceedings of the international conference at Geneva that adopted the Convention are published in League of Nations, C. 328 M 114: 1929 II 48. See Fitz-Maurice, "Convention for the suppression of counterfeiting currency" 26 Am. Journ. Int. Law 533 (1932); Duprieux, "La répression internationale du faux moyennage," *Revue de Droit International et de Législation Comparée* 1929, 511; Mettgenberg, "Das Abkommen zur Bekämpfung der Falschmünzerei," *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* III (1933) 76.

20. In 1925, a gang, headed by one Prince Windischgraetz and including a number of other members of Hungarian society, counterfeited French franc notes on a large scale. Before the Hungarian court they asserted that their motive was to seek revenge upon France for the Peace of Trianon by spoiling the French monetary system. *New York Times*, May 22, 1926, p. 11. The case aroused wide international interest and criticism. See Toyn-

The Convention was ratified by 25 states, among them Germany, Italy, the Netherlands, Poland and the U.S.S.R., but not by the United States, Great Britain or France.[21] Great Britain, however, incorporated the basic rules of the Convention into her national law.[22]

There is nothing on record to show any actual operation of the Convention.

II. Trading in Foreign Money

Trading in foreign money is today a segment of the general banking business. It was originally, together with the trading in the multitudinous types of local money, the province of a special group of merchants, the money-changers. Known from antiquity, they played an important role in the development of international commerce during the Middle Ages.[23] In modern times they became more and more identified with the exchange of coins and notes in relatively small amounts, particularly for travelers. In continental commercial codes "money-changing" still appears as an independent form of commerce distinct from banking.[24] Nevertheless, it has long been the general opinion that the professional pursuit of money-changing is subject to the law of banking.[25] In the United States it was not without some difficulty

bee, *Survey of International Affairs* (1926) 178. The lenient attitude of the Hungarian authorities toward the counterfeiters seems to have prompted the French Government to start the Geneva conference. This was done by a letter from M. Briand to the Secretary-General of the League of Nations, Proceedings, *supra*, n. 19, at 219, and Fitz-Maurice, *supra*, n. 19, at 535.

However, except for warfare (*infra*, sec. 34 II), the importance of political counterfeiting seems to have been greatly overrated. There was no real counterfeiting in the *Kossuth* case, *supra*, p. 65. It may be mentioned, however, that an Austrian decree of April 27, 1854, declared it to be high treason to acquire or possess Kossuth dollar notes, and other currency of revolutionary propaganda. (Austrian) *Reichsgesetzblatt* 1854, 397.

21. League of Nations, *Publications (Legal)* 1937 A 6(a) Annex 1, p. 68. giving a list as of August 31, 1937. There are no later reports.

22. Counterfeit Currency (Convention) Act, 1935, 25 & 26 Geo. V, c. 25. which deviates from the traditional English terminology in that it includes "forging" of notes in "counterfeiting."

23. Endemann, *Studien in der Romanisch-Kanonistischen Rechts-und Wirtschaftslehre*, I (1874), 102, 190; *ibid.*, II (1883), 200. These brilliant discussions are primarily concerned with the Italian money-changers (*campsores*) and with the attitude of ecclesiastic law to their activities. The business of the *campsores* had early developed to great importance. Regarding the "King's exchangers," see *supra*, p. 99.

24. French Commercial Code 632; German Commercial Code 1(4).

25. Cf. *Hinckley* v. *City of Belleville*, 43 Ill. 183 (1867).

that the courts recognized transactions in foreign money as a legitimate part of corporate banking business.[26]

Except for the rules on counterfeit foreign money, there is little general law on transactions in foreign money, leaving aside exchange control and kindred measures. One may mention that with money-traders it is reasonable to assume a general rule according to which if one party to the transaction is in default, the other is ordinarily duty-bound to "cover" himself in order to mitigate his losses. The covering is done by purchase or sale, respectively, of foreign money in the open market.[27] On the whole, however, the rules on deals in foreign money depend on the nature of the particular type of transaction involved. The most important modern types are cable transfers and forward transactions.

III. Cable Transfers [28]

The "cable transfer" has been judicially described as a contract by which a banker "in consideration of the money paid to him

26. *Webber* v. *American Union Bank*, 221 App.Div. 94, 222 N.Y.S. 359 (1927) [reversing a judgment of the lower court, which had declared unlawful the crediting by a bank of its client for an amount in foreign currency against the payment of dollars and the issuing of a "Special Deposit Book" for the amount of foreign currency]. The correct view is advanced in *Federal Trust Co.* v. *State Bank*, 241 Mass. 572, 135 N.E. 879 (1922), and, as to trust companies, in *Gerold* v. *Cosmopolitan Trust Co.*, 245 Mass. 259 at 261, 139 N.E. 624 (1923). In order to safeguard inexperienced immigrants against fraud, a New York Act forbids any person or corporation, unless authorized, to do business as an agent for any steamship company, express company, or banking institution for the purpose of receiving money for transmission abroad by draft, money order, or otherwise. Steamship and express companies are forbidden to receive money as depositaries; they must transmit the money within a stated number of days. *New York General Business Law*, §§ 160–166. In Illinois, trading in foreign exchange by non-banking enterprises must be licensed and is subject to certain governmental regulations. Ill.Rev. Stat. 1949, c. 6, § 57¼ *et seq.* *Italia America Shipping Corporation* v. *Nelson*, 323 Ill. 427, 154 N.E. 198 (1927), held the statute constitutional.

27. A purchase, under such circumstances, by a German banker, of pounds sterling sold and not delivered by an English banker, was held proper in re *British American Continental Bank—Lisser and Rosencrantz's Claim*, [1923] 1 Ch. 276 (C.A.). The rule does not apply to ordinary debts expressed in foreign currency. *Infra*, p. 344.

28. The law on cable transfers (in German: *Auszahlungen*) has been extensively treated in continental legal writings. H. Rosenthal, *Die Auszahlung*, [*Beiträge zur Kenntnis des Rechtslebens*, ed. by the writer, no. 5] (1927); Ott, *Devisengeschäfte nach Schweizerischem Recht* (1924); less comprehensive is Mater, *Traité Juridique de la Monnaie et du Change* (1925) 336.

will create a credit for a given person of a given amount of the desired foreign money at a given place through orders dispatched by wireless and confirmed by mail to somebody who will obey his directions in setting up the credit." [29] The idea of one court, that the bank forwards the foreign money like a "trunk" shipped by a common carrier, is, of course, naive.[30] The bank, having received domestic money (the "purchase" price) from the client, will use this money to procure foreign exchange to be delivered abroad by a correspondent bank on behalf of the "selling" bank. Although the expressions "sale" and "purchase" of a cable transfer are customary in American and foreign business, there is no sale in the legal sense. No specific money and no right of action against a third person is transferred to the "purchaser". Payment in foreign money will be made by the foreign bank, but this does not amount to an assignment of a pre-existent chose in action. No actionable right against the foreign bank is ordinarily acquired by the client or by the payee except in those American jurisdictions which consider the foreign bank a direct agent of the client; [31] there need not even exist, at the time of the payment, a credit of the selling bank with the foreign bank.[32] While a "purchase" doctrine has repeatedly been followed by American and other courts, an "agency" theory, which prevailed in German

See also Minty, *The Law Relating to Banking and Foreign Exchange* (1936) 279; Michie, *The Law of Banks and Banking* VI (1933) 234; Zollmann, *Banks and Banking* VII (1936) 243; Stone, "Some legal problems involved in the transmission of funds," 21 Col.L.Rev. 507 (1921); Fraenkel, "Some aspects of the law relating to foreign exchange," 20 Col.L.Rev. 832 (1920).

29. *Gravenhorst* v. *Zimmerman*, 236 N.Y. 22, 139 N.E. 766 (1923).

30. See *Strohmeyer & Arpe* v. *Guaranty Trust Co.*, 172 App.Div. 16, 157 N.Y.Supp. 955 (1916), discussing and reversing the judgment of the court below.

31. American courts have split as to whether the correspondent bank becomes a direct agent of the client or merely a sub-agent liable only to the transmitting bank. Many courts hold the first bank responsible for the negligence of its correspondent, no privity existing between the latter and the client. Others refuse to impose liability upon the first bank and instead grant to the client a direct action against the correspondent bank. *E. g.*, *Nicoletti* v. *Bank of Los Banos*, 190 Cal. 637, 214 Pac. 51 (1923), and authorities there cited; see also Note, "Duty and liability of bank under agreement to remit money", 27 A.L.R. 1488 (1923); Morse, *Banks and Banking* (6th ed., 1928), c. 17; *American Jurisprudence* VII (1937) 477 "Banks".

32. See *Legniti* v. *Mechanics and Metals Nat. Bank*, 230 N.Y. 415, 130 N.E. 597 (1921). The Statute of Frauds therefore cannot apply to cable transfers, even if it is extended by state legislation to "choses in action". *Equitable Trust* v. *Keene*, 232 N.Y. 290, 133 N.E. 894 (1922), reversing 195 App.Div. 384, 186 N.Y. Supp. 468 (1921).

courts and has been used to a certain extent in this country,[33] would seem preferable, provided it be employed with qualifications which would allow for certain "sale" features of the transaction.[34] First of all, the domestic money paid by the client to his bank should not be considered, through a rigid application of agency law, as a quasi-trust found, giving the client, upon the bankruptcy of the bank, a privilege over its general creditors; the deposit of money, and the execution of the client's order are separate acts from the more formal viewpoint of banking technique and law. Hence the client must be treated like other depositors.[35] To this extent, the result will be the same as under the "purchase" theory. In civil law, no such problem can arise; the client will invariably rank among the general creditors, due to the absence of the trust doctrine.

But if the bank, in carrying out the client's order, has acquired a chose in action against a foreign bank, a distinct and identifiable "res" has come into existence which should be reserved, under Anglo-American law, as a quasi-trust fund for the client,[36] subject, however, to the bank's lien; and this lien may become particularly important where it is the client who becomes insol-

33. In favor of the purchase doctrine: *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.*, 172 App.Div. 16, 157 N.Y.Supp. 955 (1916); *Legniti* v. *Mechanics and Metals Nat. Bank*, 230 N.Y. 415, 130 N.E. 597 (1921); Swiss Federal Tribunal, April 6, 1925, *Amtliche Sammlung* 51 II 199. [The *Legniti* case suggests that, on a different set of facts, indicated by the court, the agency theory would be appropriate; those facts, however, do not seem to be relevant.] In favor of the agency doctrine: *Bank of British North America* v. *Cooper*, 137 U.S. 473, 11 S.Ct. 160, 34 L.Ed. 759 (1890); *Reichsgericht* April 11, 1923, *R.G.Z.* 107, 136; Nov. 3, 1934, *Bank-Archiv* XXXIV (1935) 373; App. Hamburg, March 7, 1923, *Hanseatische Gerichtszeitung* 1923, 121. See also *Equitable Trust* v. *Keene*, 232 N.Y. 290, 133 N.E. 894 (1922) ["contract for future action"]. In *Samuels* v. *Drew & Co.*, 296 F. 882 (C.C.A.2d, 1924), the phrase "what the customer purchases is the banker's undertaking or obligation to effect the payment at a different point" seems not to be inconsistent with the agency conception, the expression "purchase" being used here in a non-technical sense.

34. That neither of the two theories is entirely satisfactory in itself, is well pointed out by Turner, "Deposit of demand paper as 'purchases'", 37 Yale L.J. 874, 900 (1928). See also Fraenkel, *supra*, n. 28, at 834.

35. See the *Legniti* case, *supra*, n. 32; *Gravenhorst* v. *Zimmerman*, *supra*, n. 29; *Beecher* v. *Cosmopolitan Trust Co.*, 239 Mass. 48, 131 N.E. 338 (1921); *Samuels* v. *Drew & Co.*, *supra*, n. 33; *In re Pacat Finance Corp.*, 27 F.2d 810 (C.C.A.2d, 1928); Stone, *supra*, n. 28.

36. In the *Pacat* case the client was denied an *in rem* right because he was unable to prove that the banker had procured the foreign money for his order.

vent. In such a case, the bank may sell the foreign credit and appropriate the proceeds in discharge of its claim against the customer.[37] Furthermore, the bank—unlike a typical agent—is not under a duty to charge the client only with its own cost price plus a commission; the bank is merely supposed to debit the client with a reasonable amount, in accord with market conditions. This amount, once agreed upon, the client is bound to pay,[38] provided the transfer is carried out by the bank.[39] If this has not been done—through or without fault of the bank—the client may rescind the contract and sue for the amount paid by him.[40] If subsequent to the transfer the foreign money cannot be delivered, the banker, having fully performed his duty, will be held only to the market value at the time of its return in case the foreign money has depreciated.[41]

While to this extent one might find elements of the sale relationship in the transaction, the agency features prevail. As was pointed out, the contract is not executed until the bank has made the money available to the client abroad. Moreover, the bank must strictly carry out the directions of the client with respect to the manner of payment and to other particulars of the transaction.[42] It will be responsible for acts done or omitted by it or

37. The *Reichsgericht*, Nov. 3, 1934, *Bank-Archiv* XXXIV (1935) 373, negatives the bankers' right in a case where the banker, before and probably in anticipation of, the customer's insolvency, had stopped execution of the contract.

38. The time of payment, if not expressly fixed by contract, may be gathered from business custom. Generally, the "purchaser" has to perform first. Swiss Federal Tribunal, cited *supra*, n. 33. More on this point in H. Rosenthal, *supra*, n. 324, at 12, 29.

39. In this sense the contract is "executory" rather than an "executed" sale. *Atlantic Communication Co.* v. *Zimmerman*, 182 App. Div. 862, 170 N.Y.S. 275 (1918).

40. *Chemical Nat. Bank of New York* v. *Equitable Trust Co.*, 201 App.Div. 485, 194 N.Y.S. 177 (1922); *Safian* v. *Irving Nat. Bank*, 202 App.Div. 459, 196 N.Y.S. 141 (1922), *aff'd* 236 N.Y. 513, 142 N.E. 264 (1923); *Buckman* v. *American Express Co.*, 262 Mass. 299, 159 N.E. 629 (1928); *Atlantic Communication Co.* v. *Zimmerman*, 182 App.Div. 862, 170 N.Y.S. 275 (1918); *Kerr S. S. Co., Inc.* v. *Chartered Bank of India, Australia, and China*, 292 N.Y. 253, 54 N.E.2d 813 (1944). In the *Kerr* case the bank had given a draft on a foreign branch of its own, and buyer and payee were different persons. Both circumstances were held irrelevant.

41. *Katcher* v. *American Express Co.*, 94 N.J.L. 165, 109 A. 741 (1920); *Weiss* v. *Liberty Trust & Savings Bank*, 227 Ill.App. 405, 410 (1923). Short of payment to the beneficiary, the client can revoke his instructions while the money is in the hands of the remitting bank or its agent. *Société Coloniale Anversoise* v. *London & Brazilian Bank*, [1911] 2 K.B. 1024 (K.B., 1911).

42. For an example of an unusual

by its subagents according to the law of agency, and its deviation from the directions given will be excused neither by the consent of the payee [43] nor by the fact that the bank followed a technically correct method.[44] The liability of the bank, however, is ordinarily limited by special provisions incorporated into the contract.[45]

In the Central European countries, banking accounts in foreign exchange, such as dollar accounts, were widely used until they were more or less suppressed by exchange control.[46] This accounting device which assimilates foreign money transactions to regular bank deposits, brings into relief the creditor-debtor relationship or what would be tantamount to it: the "purchase" feature of the relationship between the bank and the customer. One may also mention the tendency of German law and its derivatives to place a stockbroker in the advantageous position of a vendor or purchaser.[47] Since foreign exchange was traded on the stock exchanges,[48] foreign-exchange brokers, too, profited from that trend.

direction to the bank, see App. Hamburg, May 26, 1919, *Bank-Archiv* XIX (1919) 9, where a customer had directed that a payment in Lisbon, of Portuguese money, be made by a Madrid bank.

43. *Bank of British North America* v. *Cooper*, 137 U.S. 473, 11 S.Ct. 160, 34 L.Ed. 739 (1890). The defendant bank, receiving money from the plaintiff, contracted to send a cable transfer to its London office, and thereafter to remit the amount through the mail by check to the payee in Glasgow. The cable transfer was sent, but pursuant to a request by the payee, the London office deposited the amount in a London bank to the account of the payee. The amount was applied to the payee's indebtedness to the London bank. The court held defendant bank liable for the loss to plaintiff, who was obliged to meet a draft which the cabled amount was supposed to cover.

44. *Landesberg* v. *Bankers Trust*, 121 Misc. 117, 200 N.Y.S. 308 (1923).

45. Such stipulations were applied in favor of the bank, in *Alemian* v. *American Express Co.*, 237 Mass. 580, 130 N.E. 253 (1921); *Sommer* v. *Taylor*, 190 N.Y.S. 153, 154 (1920); they were discarded by restrictive interpretation in *Gravenhorst* v. *Zimmerman*, 236 N.Y. 22, 32, 139 N. E. 766, 769 (1923).

46. Swiss Federal Tribunal, April 6, 1925, *Amtliche Sammlung* 51 II 199, bears upon a guilder account with a Swiss bank.

47. The stock exchange broker may and does declare himself a vendor-purchaser and thereby escape fiduciary duties laid upon him. (So-called *Selbsteintritt* or right to enter the contract as a vendor or a purchaser.) See the writer's, *Tatsachen und Begriffe in Deutschen Kommissionsrecht* (1917) 67.

48. Official regulations existed in the stock exchanges on transactions in foreign exchange, including transactions in foreign banknotes and coins. See the writer's *Das Geld* (1925) 256; Nagl, *supra*, p. 37, n. 33, at 242.

In a free market the quotations of cable transfers are generally considered to represent the true value of the foreign currency in question.[49]

IV. "Forward" and "Spot" Transactions [50]

Forward transactions are modeled after the pattern of futures in produce exchange dealings. Where a currency is fluctuating in value, merchants contracting for future sales of commodities, to be paid in that currency, will feel the need to seek protection against loss threatening from an adverse movement of the rate of exchange until the time of payment. The same will be true if those merchants are operating under a fluctuating currency, even if the currency contracted for is a stable one. Protection can be obtained through a "hedging" transaction, namely, by the commodity purchaser buying "forward" the amount of foreign currency needed, and by the commodity vendor selling short in the forward market. To take a pre-war instance: a firm in Shanghai, having bought goods from a London house for pounds, payment to be made in three months' time, may have had secured the pounds from a bank to be delivered at the same time, with Chinese money at the current rate for forwards.[51] The example is somewhat oversimplified, but sufficient for the purpose of the present discussion. Hedging of this type is in accord with prudent business conduct. Thus when the vendee of goods had secured the purchase price by a hedging transaction the foreign vendor who had failed to deliver the goods was held liable to compensate him for the loss incurred when the money secured could not be used for the payment of the goods.[52]

49. *Infra*, p. 336.

50. Whitaker, *Foreign Exchange* (2d ed., 1933) 285; S. E. Thomas, *Principles and Arithmetic of Foreign Exchange* (1934) 240; Vogel, "*Das Devisen-Termin-Geschäft*," [*Bank- und Finanzwirtschaftliche Abhandlungen*, ed. by Prion, No. 4] (1924).

Forward transactions are referred to in the Articles of Agreement of the International Monetary Fund, Art. V, sec. 3(b) and indirectly in Art. IV, sec. 3. *Infra*, sec. 37 at n. 8.

51. For such a case, involving "exchange contracts" between a Shanghai commercial corporation and a London bank, see *Bank of China, Japan and the Straits, Limited* v. *American Trading Company*, [1894] A.C. 266 (Pr.C., 1894). On hedging contracts generally, Patterson, "Hedging and wagering on produce exchanges", 40 Yale L.J. 843 (1931), and with regard to foreign exchange, Minty, *The Law Relating to Banking and Foreign Exchange* (1936) 273; the writer's "Die Börsengeschäfte" in *Ehrenberg's Handbuch des Handelsrechts* IV part 2 (1918) 634.

52. *Reichsgericht*, Sept. 29, 1924, *J.W.* 1925, 138; Oct. 13, 1925, *R.G.Z.* 111, 380, citing the writer for the appropriateness of hedging. *Contra*: Austrian Supreme Court, Oct. 23, 1923, *Die Rechtsprechung* VI (1924) 54. Still there is no duty to hedge.

Futures, of course, lend themselves not only to hedging purposes, but also to speculation and wagering just as in the produce exchanges. There are a number of continental decisions passing on the application of gambling laws to futures in foreign exchange,[53] some of them invalidating the contracts on that ground.[54] The writer has been unable to find pertinent American cases, although it is somewhat surprising that the American public should have foregone this opportunity for speculating. On principle short selling in foreign exchange futures would not appear to be invalid.[55]

Apart from the gambling acts, "futures" in foreign exchange

App. Hamburg, Feb. 17, 1923, *Die Rechtsprechung der Oberlandesgerichte* XLIII 105. When the mark dropped incessantly the *Reichsgericht*, in the 1924 decision, held the foreign mark-debtor obligated to close his hedging transaction. But what the *Reichsgericht* really did was to expect the debtor to predict later monetary developments. In fact, the court more or less abandoned this objectionable view in the 1925 case, citing the writer. See also *Reichsgericht*, Dec. 16, 1924, *J.W.* 1925, 1270.

53. *Bank of China, etc.* v. *American Trading Co.*, [1894] A.C. 266 (Pr.C., 1894); *Reichsgericht*, Nov. 22, 1928, *Hanseatische Rechts-und Gerichtszeitschrift* 1929 B 55; App. Berlin, Jan. 27, 1925, *J.W.* 1925, 643 [typical of foreign exchange transactions under an unsettled currency]. The most thorough discussion of the problem is to be found in Italian decisions and legal writings. See Ital.Cass., May 20, 1927, *Giurisprudenza Italiana* 1927 I 1216; July 25, 1927, *ibid.*, 1927 I 912; App. Bari, Aug. 5, 1927, *Foro Italiano* 1927, *Repertorio*, sub nomine *Borsa* n. 65 and cases cited in next note. Comments in Vivante, "Il Commercio fittizio dei cambi" *R.D.Comm.* 1927 I 281; Lordi, "Pagamento per causa illicita in contratto differenziale su divisa estera", *ibid.* 1927 I 101; Supino, "La questione ultrasecolare dei contratti differenziali", *Diritto Commerciale* 1927 I 212. Helpful summaries are *Z.A.I.P.* 1929, 30 and 316.

54. *Reichsgericht*, Oct. 2, 1893, Bolze, *Praxis des Reichsgerichts* XVII 271; July 13, 1894, *ibid.* XIX 314 (involving futures in Russian rubles); Ital.Cass., March 30, 1927, *R. D. Comm.* 1927 II 579 (ann. by Rotondi); App. Torino, March 15, 1927, *ibid.* at 591; same Court, August 17, 1927, *Diritto Commerciale* 1928 II 82.

55. See C. H. Meyer, *The Law of Stockbrokers and Stock Exchanges* (1931) 230, citing cases. The New York Personal Property Law, § 33, expressly validates short selling. That short selling is not sufficient to make transactions in foreign exchange invalid has been held also by the App. Naples, Feb. 21, 1924, *R.D.Comm.* 1924 II 173, and by the Supreme Court of the Saar Territory, March 21, 1923, *J.W.* 1924, 199. In *Corsino* v. *Hanover Trust Co.*, 253 Mass. 5, 147 N.E. 868 (1925), the court took pains to show that there was no shortselling on the part of the bank, but this does not necessarily mean that under the opposite theory the court would have invalidated the contract.

have been restricted by special legislation.[56] In these instances hedging transactions have sometimes been left undisturbed.[57]

V. Restrictions on Foreign Money

Restrictions on the influx of foreign money have been known since the Middle Ages where the importation and circulation of foreign coin were sometimes prohibited generally or partially, as violative of the local ruler's prerogative and as harmful to his financial interests.[58] In later times measures were taken especially against infiltration of foreign paper money.[59] In this country the use of foreign paper money for circulation and in payments has long been subject to the 10% death tax,[60] but the tax does not apply to importation or to a sale of foreign coins; besides, in practice there has been little stress on this kind of taxation. Under an antiquated New York law the uttering or circulation as money of bank notes or similar documents issued by corporations or individuals residing outside the State is forbidden to banks under penalty.[61] On a larger scale restrictions upon foreign money have emerged since the outbreak of the world

56. For instance, German Decrees of July 3, 1923, *R.G.Bl.* 1923 I 511, and of Nov. 8, 1924, *ibid.* 1924 I 729, Art. I, § 3, replaced by the law of Feb. 4, 1935, *R.G.Bl.* 1935 I 105, § 30, and Swiss and French legislation in next note. Historically noteworthy is the abortive American legislation of 1864, *infra*, sec. 42, n. 11.

App. Douai, July 29, 1926, *J.D.Int.* 1927, 379, invalidated foreign exchange futures as violative of French legislation against the flight of capital, but there were special facts supporting the court's theory.

57. A Swiss decree of June 19, 1936, tr. *Federal Reserve Bulletin*, 1936, 707 prohibits forward purchases of foreign exchange "if such operation is not based upon a commercial transaction which warrants it". A similar exception was incorporated in the French Monetary Law of Oct. 1, 1936, *J.D.Int.* 1936, 1167, prohibiting unlicensed exportation and importation of gold. In both laws the exception evidently envisages principally hedging operations and this was recognized in the case of the French law by Trib. comm. Seine, Dec. 12, 1938, *Gazette du Palais*, March 3, 1939.

A French decree of July 8, 1937, *D.P.* 1937 IV 150 laid a heavy tax on speculative transactions not aimed at "hedging".

58. *Supra*, p. 64, n. 30, and *infra*, p. 447.

59. *Supra*, n. 7 (ruble notes). The Massachusetts Public Act 1743/4, c. 8 (3 *Acts and Resolves of the Province of Massachusetts Bay* 122) barred the importation of Rhode Island paper money, *infra*, sec. 40, at n. 46.

60. *Supra*, p. 90.

61. New York Penal Code § 298(2). New York Banking Code § 133, expressing a similar policy and explicitly forbidding circulation of bills "payable otherwise than in lawful money of the United States" was repealed by Laws 1938, c. 459, § 15.

monetary crisis in 1931. Rapidly spreading exchange control in the first place has affected transactions in foreign money. At present such transactions are subject to stringent regulations in most countries.[62] The latter widely modify the normal rules as set forth in this section. One has to keep in mind that the regulations of at least two countries have to be consulted in each particular case, viz., of the countries where the transaction takes place and where it is to be performed. These difficulties have brought about a marked decrease of private participation in international monetary transactions.

In some cases, the use of foreign currency in the payment of foreign-currency debts has been barred by international agreements.[63]

Section 23

VALUATION OF FOREIGN MONEY

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I. Introductory

Valuation of foreign money is required on many occasions. The main instances are the assessment of damages incurred in terms of foreign money and the income and property taxation of foreign money. Another ample source of valuation is the common law rule which requires the conversion of foreign currency debts into the money of the forum. The American tariff law is likewise in point. American customs duties are normally computed on the basis of the "foreign value" of the imported goods, *i. e.*, on the basis of the market value in the country of exportation; for the assessment of the duties such market value has, of course, to be converted into dollars.

Quite preponderantly, the valuation has to be made with respect to bank accounts or other debts phrased in foreign currency rather than to tangible foreign money. Nevertheless, the principles of valuation will be the same in all cases except that bank credits and other debts are subject to additional tests considering the solvency of the debtor and other circumstances influencing the value of debts. The methods of evaluating foreign money

62. *Infra*, sec. 31. 63. *Infra*, p. 489.

have changed rapidly. In our day more than ever they are unstable.

II. Mint Par

Under a gold standard it seems to be a proper way of valuation to ascertain the value of the pure gold contained in each of the standard coins and to determine, on this basis, the equation between the two units. The same operation is possible if both of the currencies compared are on a silver standard.[1] The equation thus found is appropriately called the "mint par" since the expression "par of exchange," employed in early American decisions,[2] is liable to be confused with the term "rate of exchange." Conforming to a strictly metallistic theory, the prevailing American practice in the first half of the 19th century and even later [3] was to employ the mint par. Said a Massachusetts court in praise of it: "This is an absolute standard not liable to vary with the causes which produce fluctuations of exchange; and in the absence of any special contract, appears to be the most practical and just." [4] The mint par theory has survived in the provisions of the present Tariff Act.[5]

1. Difficulties arise where one of the currencies is on gold and the other on silver. In *U. S.* v. *Whitridge*, 197 U.S. 135, 25 S.Ct. 406, 49 L.Ed. 696 (1905), involving the dollar-rupee ratio, the Court took into account the rate of exchange and the bullion value of the rupee. The rupee-sterling ratio was considered in *Ash* v. *Goodliffe*, 6 Buch. 242 (South Africa, 1876), where the mint par was styled "nominal value."

2. See, e.g., *Butt* v. *Hoge*, 2 Hilt. (N.Y.) 81 (1858); *Bush* v. *Baldrey*, (11 Allen) 93 Mass. 367 (1865); *Guiteman* v. *Davis*, 3 Daly (N.Y.) 120 (1862) [where the term "*real* par of exchange" means what is generally called the "rate of exchange"]. An early French case applying the mint par through reference to the "intrinsic value" is App. Rennes, March 2, 1813, *Jurisprudence Générate, Répertoire* (1855) "Monnaie" § 6 # 73. Later French terminology distinguishes between *pair* (mint par) and *parité* (rate of exchange).

3. *Martin* v. *Franklin*, 4 Johns. (N. Y.) 124 (1809); *Scofield* v. *Day*, 20 Johns. (N.Y.) 102 (1822); *Adams* v. *Cordis*, 8 Pick. (25 Mass.) 260 (1829); *Alcock* v. *Hopkins*, 6 Cushing (60 Mass.) 484 (1850). The two latter cases allowed broad exceptions. In *Grant* v. *Healy*, Fed. Cases No. 5696, 3 Sumner 523 (C.C.D.Mass. 1839), Mr. Justice Story held the *par of exchange* applicable to domestic payments, the *rate of exchange* to payments abroad. See also the thorough discussion in his *Commentaries on the Conflict of Laws*, secs. 308 et seq. (8th ed. by Bigelow, 1883) and especially his analysis of *Cockerell* v. *Barber*, 16 Ves.Jr. 461, 33 Eng. Rep. 1059 (Ch. 1810), where Lord Eldon, for particular reasons, used the mint par rule.

4. *Bush* v. *Baldrey*, 93 Mass. (11 Allen) 367 (1865).

5. *Infra*, p. 337.

A striking peculiarity of early American usage is the treatment afforded the mint par ("par of exchange") between the dollar and the pound sterling. By a proclamation of Queen Anne of 1704 the Spanish dollar was rated at 4 sh. 6d. or 54 pence, rendering the pound equal to 4.44 4/9, roughly 4.44 dollars.[6] This ratio was preserved in commercial custom for more than 150 years although both the Spanish dollar and its successor, the United States dollar, underwent alterations within this period and although England had proceeded from a gold-silver standard to a plain gold standard.[7] Congress sanctioned the custom when in 1799 it prescribed the 4.44 rate for customs purposes.[8] This so-called "technical par" was further divorced from reality through the devaluation of the dollar in 1834 and it was entirely upset by the depreciation of the greenbacks.[9] The commercial rate of exchange was then calculated in percentages of the "technical par", and expressed in dollars and cents on the basis of £1 = $4.44. A quotation of $1.50 would therefore mean that the pound sterling was worth $6.66, a mode of reckoning important for a proper understanding of earlier American decisions.[10] This method proved so confusing and detrimental that Congress by an Act of March 3, 1873, fixed the value of the pound sterling for customs purposes as well as for the construction of contracts at $4.86, in accord with the mint par, and at the same time declared contracts made after January 1, 1874, on the 4.44 4/9 parity "null and void"—a strange provision.[11] The extension of the legal ratio to contracts was bound to create new difficulties when the pound depreciated after World War I. The 1873 law was, therefore, repealed in 1921.[12]

6. *Infra*, sec. 40 III.

7. See Sen. Rep. No. 317, 42d Cong., 3d Sess. (1873) 3, and *Adams* v. *Cordis*, 25 Mass. 260 at 263 (1829).

8. Act of March 2, 1799, § 61, 1 Stat. 627, 673. It was held in *Phillips* v. *Ins. Co. of Philadelphia*, Fed.Cas. No.11,102 (C.C.D.Pa., prior to 1822) and *Guiteman* v. *Davis*, 3 Daly (N. Y.) 120 [1862] that the Act merely bears upon customs. Story, *Conflict of Laws* (8th ed., 1883) sec. 309, apparently understood the statute the other way. A general evidentiary effect was given to it by *Butt* v. *Hoge*, 2 Hilt. (N.Y.) 81 (1858). The statute was replaced by an Act of July 27, 1842, 5 Stat. 496, instituting, again for custom purposes, a ratio of 4.84 taking into account the devaluation of the dollar in 1834.

9. *Infra*, sec. 42 I.

10. See the cases cited *supra*, n. 2 and 3.

11. 17 Stat. 602 at 603, § 2, as explained by the Report of the Senate cited *supra*, n. 7. That not merely a revenue regulation was intended by this law was held in *King* v. *Hamilton*, 12 F. 478 (C.C.D.Or.1882).

12. Act of May 27, 1921, § 403(d), 42 Stat. 9, 17. Still as late as 1924 an attempt was made to obtain an unjust profit from an application of the 1873 Act. It was rejected by

III. Rate of Exchange [13]

The Massachusetts court's praise of the mint par was caused by a misconception. "Rarely is the actual economic value [of a foreign monetary unit] at the gold par." [14] Even supposing that both countries concerned maintain a perfect gold standard the value of the gold unit will fluctuate between the "gold points." Besides, political and economic developments may broaden the range of fluctuations. Hence, the rate of exchange reflects the variable market price for the foreign currency. Its use has gradually become the method employed by the courts for the evaluation of foreign money.[15]

Foreign exchange is traded in various forms, ordinarily varying somewhat in price; as coins or notes, short-term or sight bills of exchange, checks, and cable transfers.[16] While at one time sight bills of exchange drawn upon the main market place

the court through a sensible construction of the contract. *Wye Shipping Co., Ltd.* v. *Hunter, Benn & Co.*, 211 Ala. 326, 100 So. 475 (1924). The repeal of the 1873 Act was not mentioned in the proceedings.

13. On this topic see the informative article by Mann, "Problems of the Rate of Exchange," 8 Modern Law Review 177 (1945).

Rates of exchange are found in Board of Governors of the Federal Reserve System, *Banking and Monetary Statistics*, 1943, No. 173 "Foreign exchange rates by countries" (for the most part since 1913 or 1916); and in Diesen, *Yearbook of Exchange Rates of the World* (Oslo) since 1922. Monthly reports in the *Federal Reserve Bulletin*.

14. Whitaker, *supra*, p. 329, n. 50, at 324.

15. *Robinson* v. *Hall*, 28 How.Pr. (N.Y.) 342 (1864); *Guiteman* v. *Davis*, 3 Daly (N.Y.) 120 (1862); *Liberty Nat. Bank of New York* v. *Burr*, 270 F. 251 (E.D.Pa., 1921); and many later cases. The purchasing power of the foreign exchange is irrelevant on this score. *Moser* v. *Corn*, 140 Misc. 417, 249 N.Y.S. 606 (1931), *aff'd* 234 App.Div. 842, 254 N.Y.S. 922 (1931). As to non-American courts, resort was had to the rate of exchange in *Delegal and Others* v. *Naylor*, 7 Bing. 460, 131 Eng.Rep. 178 (Common Pleas, 1831), where damages for lost Peruvian paper dollars ("billets") were awarded on the basis of the rate of exchange on Lima; and *in Re Tillam, Boehme and Tickle Pty., Ltd.*, [1932] Vict.L.R. 146 (Sup.Ct., 1931), advancing an elaborate argument. While in Argentina the dollar-peso ratio was by statute fixed on the basis of the mint par, it was held that in the conversion of dollars into Argentine money the Argentine courts had to use the rate of exchange as of the place of payment. Supreme Court of Argentina, June 3, 1927, *Revue de Droit Maritime Comparé* XVII 172, and Fed. App. Buenos-Aires, judgments of June 5 and 8, 1925, *ibid.*, XII 41 and 42. In the continental courts the use of the rate of exchange is universally considered a matter of course.

16. As to the technique of dealing in foreign currency, see Whitaker and S. E. Thomas, *supra*, p. 329, n. 50; Arnauné, *La Monnaie, le Crédit et le Change*, (6th ed., 1922) 123.

of the foreign country were the normal basis for calculation,[17] there is today practically no doubt that the rate of cable transfers (the "spot" rates) should control.[18] This is especially true under American law.[19] There, reliance on cable rates is supported by the provision of the Tariff Act which under certain conditions now actually prevailing replaces the use of the mint par by the use of the "rate for cable transfers." [20] In fact, the old term "rate of exchange" *(cours du change, Wechselkurs)* has been carried over to cable rates.[21]

Applicability of the rate of exchange not infrequently gives rise to questions of law. Where the respective local markets are at variance, the place of payment has been held controlling.[22] Doubts may arise from the fact that local quotations do not reflect the real market situation or have been discontinued as a result of political or financial troubles. Such a situation would not warrant a reliance upon the last official and true quotation;[23]

17. The "rate of exchange for sight drafts" is still the measure under the English Bill of Exchange Act of 1882, § 72(4), but such a rate no longer exists. The rate of cable transfers would be the proper substitute as explained in the text.

18. Mann, *supra*, at 180. Dr. Mann suggests (p. 181) that where a liquidated amount in foreign currency has to be judicially converted into local money, the rate for foreign legal tender, ordinarily banknotes, rather than the rate for cable transfer, should be used. Under present conditions, however, money circulating outside the country of origin is very often tainted with illegality and racketeering. *Infra*, p. 485.

19. American quotations of foreign exchange are published daily by the press. They are issued by a group of banks under the leadership of the Federal Reserve Bank of New York.

20. *Infra*, n. 26.

21. Also, commercial habits rooted in the past have a tendency to persist, complicating the quotation of rates of exchange. Arnauné, *supra*, n. 16, at 127 and passim. The American use of the "technical par" in the sterling rate, supra, p. 334, is an example.

On the meaning of "exchange" see *supra*, p. 318, n. 2.

22. *Richard* v. *National City Bank*, 231 App.Div. 559, 248 N.Y.S. 113 (1931); *Steingut* v. *Guaranty Trust Co. of New York*, 58 F.Supp. 623, 640 (S.D.N.Y., 1944), aff'd 161 F.2d 571 (C.C.A.2d 1947); *Manners* v. *Pearson*, [1898] 1 Ch. 581, 592. Similarly, Supreme Court of Austria, February 1, 1933, *Die Rechtsprechung* 1933, 29. *Rudkowsky* v. *Equitable Life Assur. Soc.*, 145 Misc. 765, at 777, 261 N.Y.S. 23 (1932), *rev'd Goldberg-Rudkowsky* v. *Equitable Life Assur. Soc.*, 266 N.Y. 451, 195 N.E. 149 (1934), decides for the place where the remedy is sought.

23. As was held in wartime by the Austrian Supreme Court, August 1, 1916, *Zentralblatt für die Juristische Praxis* 1917, 640. *Contra:* Ital. Cass., March 29, 1924, *Foro Italiano* 1924 I 587 [regarding Austrian currency], and the early English case, *Pollard* v. *Herries*, 3 Bos. & Pull. 335, 127 Eng.Rep. 183 (Com-

instead, a fair appraisal of the market should be sought by a weighing of all available data, with an eye to the point of time decisive under the law.[24]

Under present conditions it must again be emphasized that the rules and views expressed above are valid only when subject to the momentous changes which have occurred since 1931 and particularly since World War II. The crucial problem of valuation in our day—namely, the impact of exchange control—can be adequately discussed only in connection with exchange control.[25]

IV. Valuation of Foreign Money for Customs Purposes

The American Tariff Act still starts from the mint par, according to the standards set by the diverse national monetary laws. If the value thus ascertained differs by 5% or more from the rate of exchange—a very frequent case—then the applicable rates are to be published quarterly by the Secretary of the Treasury on the basis of the buying rate for cable transfers in the New York market as certified by the Federal Reserve Bank of New York.[26] The rates so determined are not subject to judicial review.[27] Though in themselves designed for internal customs

mon Pleas, 1803). See also *supra*, p. 261, n. 73.

24. Cass. Aug. 3, 1936, *J.D.Int.* 1937, 302. *Trib. comm.* Le Havre, Nov. 16, 1937, *Recueil de Jurisprudence du Havre* 1938 I 44, employed the first quotation following the reopening of the stock exchanges (closed for only a few days). See also regarding the American Tariff Act, *infra*, n. 26. In wartime resort to neutral quotations ("indirect rate of exchange") may be warranted, *Pollard* v. *Herries*, *supra*, n. 23, and Mann, *supra*, n. 13, at 192, but everything depends in this respect, on the circumstances. The difficulties of valuation under abnormal conditions are graphically depicted in the *Steingut* case, supra, n. 22, concerning the dollar-ruble rate of December 27, 1917. The court in an able opinion chose a mean value.

25. *Infra*, sec. 33 III.

26. Tariff Act of June 17, 1930, 46 Stat. 739 § 522, 31 U.S.C. 372. In the absence of such a buying rate "actual transactions and quotations in demand or time bills of exchange" may be taken into consideration. The official rates are published in the Federal Register.

27. *Cramer* v. *Arthur*, 102 U.S. 612, 26 L.Ed. 259 (1880); *Hadden* v. *Merritt*, 115 U.S. 25, 29, 5 S.Ct. 1169, 29 L.Ed. 333 (1885); *U. S.* v. *Klingenberg*, 153 U.S. 93, 14 S.Ct. 790, 38 L.Ed. 647 (1894); *U. S.* v. *Knauth*, 77 F. 599 (S.D.N.Y.1896); *Amalgamated Textiles* v. *U. S.*, 84 F.2d 210 (Court of Customs and Patent Appeals, 1936). Nor can State courts compel the Federal Reserve Bank of New York to alter exchange rates which it had certified to the Secretary of the Treasury. *Schmoll, Inc.*, v. *Federal Reserve Bank of New York*, 286 N.Y. 503, 37 N.E.2d 225 (1941). See also *U. S.* v. *George S. Bush & Co.*, 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259 (1939) [change of tariff rates by the President to offset lower costs of production under the Tariff Act §

purposes only, their significance is greater because they are by far the most important official exchange rates prescribed by law.[28] Hence they have been actually employed beyond the tariff field, especially in the international area.[29] The adoption of the rate of exchange as a factor of customs computation injects into the tariff law a flexible element which, however, is inadequate to meet the distorting impacts of heavy exchange fluctuations upon the tariff.[30] No power to change tariff rates because of exchange fluctuations has been conferred upon the executive branch of the government of the United States.[31]

Tariffs agreed upon in commercial treaties will likewise be affected and possibly undermined by wide fluctuations of the value of one of the two currencies concerned. For this reason tariff agreements sometimes provide for the termination of the agreement ("escape clause") in the case of such developments.[32] There is at least one agreement that gave the contracting governments power to change tariff rates by one-sided action in order to equalize the changes brought about by the currency fluctuations.[33] Recently treaty clauses regulating the application of exchange control have become more frequent.[34] The Havana

336, 19 U.S.C. 1336 ("Flexible Clause"): incidental fixation by the President of the rate of the Japanese yen not subject to judicial review]. Concerning a plurality of certified rates see *Barr v. U. S.*, 324 U.S. 83, 65 S.Ct. 522, 89 L.Ed. 765 (1945), *infra*, where the powers of the Secretary under § 522 of the Tariff Act are examined.

28. Exchange rates for foreign Money Orders are set by the Postmaster General, 25 Stat. 654 (1872), 39 U.S.C. 712.

29. Thus *Incitti v. Ferrante*, 12 N.J. Misc. 840, 175 A. 908 (1933) dealt with an ostensible promissory note on 15,400 Italian lire. The court held the note to be a negotiable instrument since the amount of dollars equivalent to the lire was established by proclamation of the Secretary of the Treasury. It is also noteworthy that the United States Code places the pertinent provisions of the Tariff Act into Title 31 ("Money and Finance"), rather than into Title 19 ("Customs Duties").

30. The thorough studies of the U. S. Tariff Commission, *Depreciated Exchange* (1932) and *Depreciated Exchange and International Trade* (1922), are purely economic and statistical.

31. The "Flexible Clause" of the Tariff Act, *supra*, n. 28, has only an indirect bearing on the question and is no longer important by virtue of the Trade Agreement Act of 1934, 48 Stat. 944, 19 U.S.C. 1352 (a).

32. E. g., English-American Trade Agreement of 1938, *Executive Agreements Series* No. 164, Art. XVIII; American-Turkish Trade Agreement of 1939, *ibid.*, No. 163, Art. XIV.

33. The Treaty of Commerce between India and Japan of July 12, 1934, League of Nations *Treaty Series* CLV 32.

34. *Infra*, sec. 36.

Charter for an International Trade Organization [35] establishes as the basis of customs duties the "actual value" in the country of importation, repudiating thereby the "foreign value" which is the basis of assessment in the American system. Conversion of foreign currencies where still necessary shall be made at the "par value" proclaimed by the International Monetary Fund.[36] In the absence of a "par value" the conversion rate shall reflect the "current value of such [foreign] currency in commercial transactions." The norms set forth by the Charter are not self-executory, however; they require municipal enactments for application by the customs authorities. The United States and other leading countries have not yet passed such acts.

35. Dept. of State *Publication* 3206, Art. 35 §§ 3, 4. Similarly, the (Geneva) General Agreement on Tariffs and Trade, *United Nations Publications* 1947 II 10 vol. I, Art. VII, §§ 2, 4.

36. *Infra*, sec. 38 I.

Chapter 2

DEBTS IN INTERNATIONAL RELATIONS

Section 24

FOREIGN CURRENCY DEBTS IN GENERAL

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I. The Foreign Currency Debt—A Monetary Obligation

Debts expressed in terms of foreign currency, or briefly, foreign currency debts,[1] are the necessary results of pecuniary transactions involving parties resident in different countries. Whatever the currency, it will be foreign to at least one of those countries. This is true for any import or export bargain and—always in the international field—for insurances, charter-parties and other contracts of affreightment, for loans, bills of exchange, etc. There is a tendency among contracting parties to select as the money of the contract the money of the economically most powerful country connected with the transaction. This explains why the problems of foreign-currency debts are, comparatively speaking, not so urgent in the United States and have not been in the past in Great Britain; they were always much more significant in the Continental and South American areas. In some European countries, as was mentioned,[2] foreign currencies have also been employed on a large scale in purely domestic contracts in order to place the rights and duties under the contract on a more stable basis.

The legal theory on foreign currency debts takes a different start from that used in dealing with tangible foreign money. We

1. See the able dissertation by Bequignon, *La Dette de Monnaie Étrangère* (Caën, 1925); Neumeyer, *Internationales Verwaltungsrecht* III part 2 [III] (1930) 284; W. Mayer, *Die Valutaschuld* (1934); Grube, *Pfund und Dollar* (1935), giving ample German references; Pasching, "Die Geltung fremden Währungsrechts," in *Oesterreichische Zeitschrift für Bankwesen* 1937, 87.

In German the term *Valutaschuld* is frequently employed for this kind of debt.

2. *Supra*, p. 240.

know that foreign coins and notes are considered commodities outside their country of origin. American and English Courts have repeatedly concluded that non-American (or non-English) currency as the object of a debt is likewise a commodity, and have employed quite colorful language in describing the situation, comparing the payment of Dutch guilders to a delivery of Dutch bulbs [3] or pointing out that "it is as if one should borrow his neighbor's cow".[4] But it should not be questioned that if a guilder debt is payable in Holland the guilders are to be regarded as money by any court in the world. And even where the place of payment is outside the country of origin, the commodity theory fails.[5] If an American sells goods for guilders to a Dutchman, a sale, and not a barter is involved, even though under the contract, for one reason or another, the guilders are payable in New

3. Merrill, J. dissenting, in *City Bank Farmers Trust Co.* v. *Bethlehem Steel*, 244 App.Div. 634, 644; 280 N.Y.S. 494, 505 (1935).

4. *McAdoo* v. *Southern Pac. Co.*, 10 F.Supp. 953 at 955 (N.D.Cal., 1935) ["To put a homely illustration"] The comparison with a cow is also to be found in *S. S. Celia* v. *S. S. Volturno*, [1921] 2 A.C. 544, 563 (H. of L., 1921). In *Gross* v. *Mendel*, 171 App.Div. 237, 157 N.Y.S. 357 (1916), *aff'd* 225 N.Y. 633, 121 N.E. 871 (1918), the Court in examining the conversion rate of exchange for marks payable in Germany, said that there was no reason why a different rule should be applied to contracts for the delivery of wheat, cotton, or other specific articles of merchandise. But the point was to ascertain the day controlling the conversion and the court utilizes the analogy of merchandise for that purpose only. Learned Hand, J., in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis S. W. Ry.*, 81 F.2d 11 (C.C.A.2d, 1936) seems to have followed the same line of thought in saying of promises to pay foreign money in foreign countries—"its cost in dollars is still the measure, for foreign money is a commodity . . . lawful to buy, unlike gold". See also Sutherland, J., dissenting, in *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926). *Pyrmont* v. *Schott* [1939] A.C. 145, 153 (Pr.C., 1938), likewise speaks of "commodities" with reference to a foreign currency debt. In *Rhokana Corp., Ltd.* v. *Inland Revenue Commissioners* [1938] A.C. 380, 388 (H. of L.) Lord Atkins even asserted that "there can be no debt in this country of an amount in foreign currency."

5. Accord: *Guaranty Trust Co. of New York* v. *Henwood*, 307 U.S. 247, 255, 59 S.Ct. 847, 83 L.Ed. 1266 (1939); *Reichsgericht*, June (day lacking) 1920, *J.W.* 1921, 22. Mann, *The Legal Aspect of Money* (1938) 134, gives a translated excerpt from the latter judgment. Remarkable also is the language of the German Civil Code § 244 which employs the phrase *eine in fremder Währung ausgedrückte Geldschuld* (a monetary obligation couched in terms of a foreign currency). The fact that the old action for "money had and received" extended to foreign currency debts (Mann 126) is not very important because of the free handling of that action, *supra*, p. 111, n. 34.

York. Due to the development of modern banking, the place of payment has only minor importance in this connection.[6]

The monetary character of the foreign currency debts is further brought home by the familiar phenomenon of promissory notes and bills of exchange drawn in a money other than that of the place of payment.[7] Nor could foreign currency debts if they were only obligations for the delivery of commodities give rise to interest, actually a pecuniary phenomenon.[8] In fact, French courts have applied the French legal interest rate to debts in foreign currencies.[9] Perhaps this attitude cannot be followed without qualification,[10] but where law or usage allow interest this should in principle apply to all pecuniary obligations regardless of the currency involved.[11] Courts have even for good reasons granted damages beyond interest where payment of a depreciating foreign currency debt was delayed; to this extent the restriction of damages to interest has been confined to debts calling for payment

6. The monetary nature of the obligation has sometimes been recognized only where the currency is that of the place of payment. This view has been taken by Negus, "Rate of exchange in reference to foreign debts," 40 L.Q.Rev. 149 (1924); Meyers, "Juridische vragen betreffende het geld," *Weekblad voor Privaatrecht*, etc., 1924, 169; and probably by the *Restatement, Conflict of Laws* (1934) § 423, comment. But see *supra*, p. 146.

7. *Infra*, p. 344.

8. *Supra*, p. 157.

9. See Cass., June 19, 1933, *J.D.Int.* 1934, 939, [debt in Swiss francs]. App. Rouen, Nov. 26, 1924, *J.D.Int.* 1925, 672, held that interest on pounds sterling owed as damages is to be computed in francs on the franc equivalent of the sterling amount to be assessed at the date of the damaging event (collision at sea).

10. Determination of the interest rate for foreign currency debts should rather depend on the circumstances. The Berlin Chamber of Commerce, a governmental institution, in an "official opinion" pointed out that in the case of a debt owed by a German firm to a Belgian firm in terms of Belgian francs, the reasonable rate of "delay interest" for the time following December 1, 1924 would amount to 6 to 8 percent, the discount rate of the Belgian National Bank then being 5½ per cent; in the case of a guilder debt held by a Dutch firm, a rate of 6 per cent at the highest was suggested, the Dutch currency being considered more stable. *Mitteilungen der Industrie-und Handelskammer zu Berlin* 1925, 833. Such "opinions" are rendered upon the request of the courts and they are almost invariably followed by the latter. See on inflationary interest rates *supra*, p. 165.

11. App. Douai, Dec. 15, 1927, *J.D.Int.* 1928, 675 [rubles]; App. Rouen, March 28, 1933, *Gazette du Palais* 1933 II 27 [pound sterling]; Austrian Supreme Court, Nov. 28, 1934, *Die Rechtsprechung* 1934, 228; March 5, 1936, *ibid.* 1936, 64 [dollar]; Supreme Court of Czechoslovakia, May 25, 1934, *Prager Archiv* 1935, 1497 [pound sterling]; Belgian cases listed by Piret, *supra*, p. 172, n. 1, at 104. The rule of the Italian Code of 1942, Art. 1223/

in the national currency.[12] Disparity of internal rules regarding interest has also led to a number of Conflict cases connected with foreign currency debts.[13]

Differentiation between foreign-currency and domestic-currency debts is more pronounced in some other respects. Foreign money cannot be paid into the local [14] court and under some legal systems mortgages in terms of foreign money cannot be registered in public books.[15]

24, according to which compensation for delayed payment is not limited to interest, but may include depreciation, applies also to foreign currency debts as recognized in the Report of the Minister of Justice on the "Book on Obligations" of January 30, 1941, No. 36, *Lex* XXVIII, No. 6 Supp. (1942) xxv.

In the case of a dishonored foreign bill of exchange, the claim for damages against the drawer is restricted under the Law Merchant, apart from interest and protest fees, to "re-exchange," that is, to the cost of procuring a new equivalent bill of exchange. *Pavenstedt* v. *New York Life Ins. Co.*, 203 N.Y. 91, 196 N.E. 104 (1911).

12. In this respect *Lodge* v. *Spooner*, 74 Mass. (9 Gray) 166 (1857), held the foreign place of payment immaterial.

13. Disparity of legal interest rates between Great Britain and Ireland led repeatedly to controversies. *Connor* v. *Earl of Bellamont*, 2 Atk. 382, 26 Eng.Rep. 631 (Ch., 1742); *Young* v. *Lord Waterpark* 13 Sinl. 199, 60 Eng.Rep. 77 (V. Chancellor, 1842); *Denny* v. *Denny*, 14 L.T.R. 854 (V. Chancellor, 1866); *Bushby* v. *Camac*, Fed.Cases 2, 226 (C.C.E.D.Pa., 1822). Conflicts on the application of usury (maximum interest) laws are quite preponderantly an American interstate issue, *supra*, p. 167. Statutory reductions of interest rates have raised British inter-dominial controversies. When such reductions were decreed by the Victoria and New South Wales legislatures, New Zealand debtor corporations sued for interest on coupons payable in Melbourne tried unsuccessfully to benefit from those reductions. *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society*, Ltd., [1938] A.C. 224 (Pr.C., 1937); *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Providence Soc.*, 50 C.L.R. 581 (High Court of Australia, 1934); see *infra*, p. 422, n. 20. A three-cornered Conflict situation involving the Danzig legal interest rate was passed on by the Supreme Court of Poland, judgment of Nov. 6, 1927, *Zeitschrift für Ostrecht* 1928, 1591 [dollar debt governed by Danzig law; Danzig rules on legal interest held applicable.]

14. The situation is different where the foreign currency is paid into the *foreign* court. *Zimmerman* v. *Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1926). In the case of a lira debt, the deposit of the lire, with the approval of the Italian court, in the Banco di Roma was held equivalent to payment into court as understood by American law in *Transamerica General Corp.* v. *Zunino*, 82 N.Y.S.2d 595 (Sup.Ct., 1948).

Summary proceedings and other procedural advantages—*supra*, p. 151, n. 66—may be reserved for claims in the national money.

15. Such mortgages cannot be recorded under French law, App. Paris, Feb. 21, 1925, *J.D.Int.* 1925,

A foreign currency debt must not be confused, as is not infrequently done,[16] with an obligation purporting payment of a "particular kind of currency." The latter expression commonly refers to gold coin, or to silver coin, or to bank notes, or else to a special sort of currency of a given monetary system. A foreign currency debt may or may not call for payment in a "particular kind of currency"; for instance, an obligation calling for the payment of gold francs would be a foreign currency debt and at the same time would involve a "particular kind of currency." Whatever the nomenclature, the two concepts must be kept separate.

A different situation is presented where one agrees to buy in country A, money of country B with money of A. In such a case the B money, as was seen, is dealt with as a commodity. The seller's obligation, therefore, is not in the nature of a debt [17] just as, conversely, an ordinary foreign-currency debtor is not subject to the special obligations of a *seller* of foreign currency.[18]

II. Negotiable Instruments Expressed in Foreign Money

A pressing problem is created by the international circulation of bearer bonds and of other negotiable instruments phrased in terms of the money of the country of issuance.

Legislation on this important subject does not afford the desirable guidance. Continental laws, now mainly represented by the Geneva Uniform Law for Bills of Exchange and Promissory

745, No. 2, and they were utterly restricted in German law, decree of March 12, 1931, *R.G.Bl.* 1931 I 31. Austrian law is contra. Austrian Supreme Court, Nov. 24, 1937, *Die Rechtsprechung*, 1938, 3. Italian Cass., Feb. 4, 1938, *Riv. D. Comm.* 1938 II, 376 mentions without objection a dollar mortgage on Italian real estate.

16. *Infra*, p. 345. See also *Forbes* v. *Murray*, Fed.Cas.No.4928 (S.D.N.Y., 1869). Instances from legal writings are listed by Neumeyer, *Internationales Verwaltungsrecht* III part 2 [III] (1930) 130 n. 10.

17. In *Richard* v. *American Union Bank*, 253 N.Y. 166, 170 N.E. 532 (1930), a New York bank had sold to the plaintiff, for dollars, two million Roumanian lei to be transferred to Bucharest. The lei were delivered after a delay, having depreciated meanwhile. The court made it clear that since the lei were sold as a commodity, the rule "lei for lei" was not in point; the seller was obliged to pay damages. On the other hand, the purchaser in such a situation is not entitled to *legal* interest, App. Hamburg, May 6, 1924, *Hanseatische Gerichtszeitung*, 1924, 147. See also *supra*, p. 319 [law of sales applicable] and p. 24 [purchase of local money.]

18. Austrian Supreme Court, June 28, 1923, *Rechtsprechung* V (1923) 320. A foreign currency creditor is not obligated to cover himself if the debtor does not pay in time, *supra*, p. 324, but he may do so. Same court, July 4, 1923, *ibid.* VI (1925) 25. See also *Sirie* v. *Godfrey*, 196 App.Div. 529, 188 N.Y.S. 52 (1921).

Notes (1930) Arts. 41, 77, regulate the manner of payment in case the instrument refers to a currency other than that of the place of payment. This indicates, indeed, that negotiability does not depend on the identity of the currency chosen with that of the place of payment. The same view was invariably implied by the earlier continental legislation.[19] The English Bills of Exchange Act (1882) § 72(4), likewise offers a clue merely by its regulation of the manner of payment, but the Act envisages only sums payable in the United Kingdom and not expressed in its currency. Recognition of negotiability, however, has been extended to instruments payable elsewhere other than in the local currency.[20] In the American Uniform Negotiable Instruments Law, § 6(5) is in point, which confers negotiability upon instruments designating "a particular kind of current money in which payment is to be made." This phrasing is not fortunate.[21] One would have to stretch it to the utmost in order to make it embrace foreign currency which, as was pointed out, should not be deemed "a particular kind of currency." Moreover, it is doubtful whether foreign money can be "current" within the purview of that provision. Actually courts have not as yet attacked these problems of construction, but have decided the cases on other grounds. The weight of authority is in favor of allowing negotiable instruments payable in a money other than that of the place of payment.[22]

19. The pertinent laws of the various countries are listed and discussed in Felix Meyer, *Das Weltwechselrecht* I (1909), 288. Significant are French Commercial Code 143, German Bill of Exchange Act (*Wechselordnung*) of 1849, 37, and Italian Commercial Code of 1882 (now abrogated) 39.

20. In *Bank Polski* v. *Mulder* [1942] I K.B. 497 (C.A.) a promissory note payable in guilders at Amsterdam was treated as amenable to general acceptance [Bill of Exchange Act (1882) § 19(2) (c)], which is a corollary of negotiability. In a similar sense the negotiability of a Palestinian promissory note was recognized under English law though the money promised was current neither at the place of payment nor of making, but at best only in the domicile of the *payee*. *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* [1943] A.C. 507 (Pr.C.)

21. It has been abandoned in the Code of Commercial Law drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws (1948) Art. III § 106 (1). Under this Code the instrument may be payable in any foreign money. See, however, *supra*, n. 32.

22. Negotiability seems to be recognized in *Credito Italiano* v. *Rosenbaum*, 246 App.Div. 687, 284 N.Y.S. 177 (1935), *aff'd* 271 N.Y. 583, 3 N.E. 2d 196 (1936), where the dissenting opinion of Untermeyer, J., in the court below shows that the issue of negotiabillty was adjudicated, Untermeyer, J., himself denying the negotiability. Explicitly in favor of negotiability are *Hogue* v. *Williamson*, 85 Tex. 553, 22 S.W. 580 (1893), and *Incitti* v. *Ferrante*, 12 N.J.Misc. 840, 175 A. 908 (1933), the latter using an objectionable argument, *supra*, p. 338, n. 29. In

Still, strange to say, in a world financial center such as New York, the law is not definitely settled on this momentous point. There are, it seems, not even cases expressly confirming the negotiability of bearer bonds made out in a money different from that of the place of payment or of the forum. The international business community has certainly never placed doubts on the negotiability of these papers, and courts are more than likely to vindicate that attitude should the occasion arise.[23]

III. Restrictions upon Promises to Pay Foreign Money

The validity of promises couched in terms of a foreign currency may be questioned when inconvertible paper money of the forum has become legal tender. If *cours forcé* necessarily makes illegal any agreement aimed at escaping the effects of depreciation of the national money, contracts calling for payment of foreign money may be regarded as just as reprehensible as gold clauses. The French courts have in fact drawn this conclusion [24] in the case of domestic contracts couched in terms of non-French currency. The conclusion constitutes a formidable menace to commerce, which deals on so large a scale with foreign currency. With remarkable ingenuity, however, the French courts have made their rule tolerable by expanding their doctrine of "international contracts". Transactions between French parties, though stipulated in terms of a foreign currency, have been upheld if legitimate from the viewpoint of French national economy.

Thompson v. *Sloan*, 23 Wend. (N.Y.) 71 (1840), a note made out for $2,500 in New York and payable in Buffalo, New York, "in Canada money," was held not negotiable by the court. Since there was no Canadian dollar in 1840, the note called for a payment in Canadian money *equivalent* to $2,500, hence for a sum not "certain". For this reason, which was not given by the court, the note was not negotiable. The court pointed out that making a note payable in the United States in money of a foreign denomination is but another mode of expressing the (equivalent) amount in dollars and cents, a questionable view. A strong stand in favor of negotiability was taken by Oliphant, "The theory of money in the law of commercial instruments," 29 Yale L.J. 606, 619 (1920).

23. American bonds carrying "multiple currency clauses," with sums payable alternatively in dollars, pounds sterling, guilders, etc., have been treated as negotiable instruments without any thought of the problem at hand, *infra*, p. 435. Evidently, if a sum in foreign money is "uncertain," the alternative option would likewise be tainted with uncertainty. It may also be mentioned that foreign bank notes have sometimes been recognized as negotiable instruments, *supra*, p. 318. The position taken by the Code of Commercial Law, *supra*, n. 21, adds strength to the progressive point of view.

24. The leading cases are cited *supra*, p. 267, n. 27 and 28. The rule was extended to *guaranties de change ibid.*

Thus the rule was laid down that c.i.f. contracts between French parties may validly be entered into on the basis of a foreign currency.[25] The same view was taken in the case of imported goods, such as grain, resold in France between Frenchmen as an incident of the import transaction.[26] A French exporter having sold goods abroad for the account of a French customer (as the "*commissionnaire*" of the latter) for foreign currency may settle the transaction with the customer in terms of such currency.[27] Thus the courts appear to have succeeded on the whole in imposing reasonable limits on their doctrine.[28] Still, to the extent that the foreign currency stipulation is held invalid, the consequences in respect to the contract as a whole present a difficult problem. While the gold-clause is ancillary to the sum contracted for, the foreign-currency stipulation is an integral part of the contract. A gold clause, if invalidated, may simply be stricken out and will still leave a self-sustaining contractual text; the stipulation for payment in foreign-currency, however, cannot be eliminated in this way from the contract. If, despite the invalidity of that stipulation, the court would uphold the contract as such (in the case of a long-term lease,[29] for instance), it can only be done by substituting a sum of domestic money equalling the amount of foreign money agreed upon.[30] This results in a judicial reshaping

25. App. Paris, May 12, 1928, and Orléans, June 27, 1928, *J.D.Int.* 1929, 111; Trib.comm. Marseille, Jan. 12, 1928, *J.D.Int.* 1929, 682.

26. *Cass.*, June 29, 1931, *J.D.Int.* 1932, 725; April 18, 1931, *Sirey* 1933 I 297; May 10, 1933, *J.D.Int.* 1935, 388; July 2, 1935, *Droit Maritime Français* 1935, 385; Nov. 20, 1935, *Gazette du Palais* 1936 I 263; App. Aix, Jan. 14, 1932, *Revue du Droit Bancaire* 1932, 260. The cases refer to transactions made in "strings" ("*filières*"), *i. e.*, transferable certificates.

27. *Cass.*, July 8, 1931, *J.D.Int.* 1932, 721.

28. Some cases, however, are rather arbitrary. Dollar bills of exchange between French parties were held valid by App. Paris, Nov. 20, 1938, *Recueil Juridique des Sociétés* 1939, 1005 [the bill was drawn prior to the establishment of the *cours forcé*, but the tenor of the court's argument is general.] Trib. comm. Seine, May 2, 1938, *J.D.Int.* 1939, 96, had to pass on the articles of association of a French corporation fixing the price of redemption of preferred shares in terms of pound sterling. This had been agreed upon in the interest of English shareholders, the French corporation having originally been an English one. The pound sterling provision was held valid by the court. This case is hardly reconcilable with French doctrine. See critical annotation, *J.D.Int.* 1939, 102.

29. *Cass.*, May 17, 1927, *J.D.Int.* 1928, 419, seems to assume that the lease at bar, couched in pounds sterling, was to be maintained despite the fact that the monetary stipulation was held invalid.

30. This was done by Trib. comm. Seine, Dec. 17, 1926, *Revue du Droit Bancaire*, 1927, 500. The court took as a basis the rate of exchange at the time of contracting.

of the contract, hardly to be justified on the ground of legislation which merely makes irredeemable notes legal tender.

Although the vigor and consistency, or perhaps persistency of the French courts in defending their national currency is certainly impressive, the courts have overstepped their bounds. While judicial invalidation of gold clauses, under a regime of *cours forcé* has repeatedly been undertaken in the legal history of western civilization, there is, outside France, hardly an instance of judicial invalidation of foreign-currency debts.[31] Legislative abolition of protective clauses has been confined mostly to gold clauses, and this is particularly true of the American and Canadian [32] enactments. However, there have been statutory provisions against contracting in foreign currency.[33] The first instances are found in medieval Italian city statutes.[34] Modern prohibitions form ordinarily a part of general exchange control.[35]

IV. Conflict of Laws—Cours Forcé and Depreciation

The fact that in a contract, payment is stipulated in terms of the currency of state A, does not subject the whole contract to the law of A.[36] Selection by the parties of the A currency may

31. The Belgian courts particularly have upheld foreign currency stipulations, *supra*, p. 276, n. 80. Ital. Cass., Aug. 26, 1946, *Foro Italiano* 1947 I 194, the Supreme Court of Czechoslovakia, Nov. 27, 1936, *Prager Archiv* 1937, 1065, and the Estonian Cass., Feb. 17, 1927, *J.D. Int.* 1939, 449, have done the same [the latter converted the foreign money into Estonian currency at the rate of the day of contracting]. The course of the Roumanian courts, however, may be an example to the contrary. *Supra*, p. 277, n. 87.

32. *Supra*, p. 281, n. 5 and 6.

33. Instances are the enactments of Colombia, Costa Rica, Cuba, and Mexico, *supra*, p. 281, n. 5. See also Neumeyer, *supra*, n. 1 at 181. In some countries life insurance companies are prevented from selling policies in foreign currencies, the currency risk being held incompatible with the function of a life insurance company. See Wahle, *Der Einfluss Dictierter Umrechnungskurse auf Laufende Lebensversicherungsverträge in Fremdwährung* (1932) 17. In Germany life insurance policies in foreign currency were converted into reichsmark policies by the [emergency] law of Aug. 26, 1938, *R.G.Bl.* 1938 I 1062 and decree of Sept. 10, 1938, *R.G.Bl.* 1938 I 1163.

34. See Ascarelli, "I debiti di moneta estera" *R.D. Comm.* 1923 I 445, n. 2.

35. *Infra*, 450.

36. *The Liverpool and Great Western Steam Co.* v. *The Phenix Ins. Co.*, 129 U.S. 397, 9 S.Ct. 469, 32 L. Ed. 788 (1889); *Marine Insurance Co., Ltd. v. McLanahan*, 290 F. 685, (C.C.A. 4th, 1923); *Reichsgericht*, Nov. 24, 1931, *J.W.* 1932, 586; see, however, same court June 10, 1933, *Höchstrichterliche Rechtsprechung* IX No. 1935. In general the courts, especially in England and America, pass on foreign currency debts without considering the applicability of the "law of the currency".

be one factor among others in leading to the conclusion that the parties intended to adopt the law of A as the law of the contract, but the weight of this factor in the whole setting is slight. Stipulating for payment in terms of a foreign currency is, or was, frequently a minor point or even a matter of routine. In recent times the choice of currency is more influenced by government regulations and, within this frame, by a desire to obtain a steady currency, but even so the choice remains of secondary importance.

Consequently, "foreign currency" debts are ordinarily controlled by the "domestic" or "local" law rather than by the law of the currency. Nevertheless, the latter law does have a certain limited influence. If, for instance, American parties, in an American contract, provide for payment in English pounds, only English law can tell what the "pound" is and which types of coins and notes constitute the pound currency.[37] Similarly, the parties must be governed by English legislative or administrative action affecting the value of the pound, unless the contract contains a gold or other protective clause. Consequently, and this has been discussed earlier, coins and notes which are legal tender in the country of origin have ordinarily the same quality abroad regardless of their redeemability or irredeemability.[38]

This theory has long been sharply opposed. As early as the 16th century the view was taken, especially by Bodin,[39] that a prince cannot prejudice foreigners through debasement of his coins since this would run counter to the law of nature. A similar idea is found in an English case of 1689.[40] After paper money had made its appearance, the argument of the opposition was set forth, more than a century ago, by Pardessus,[41] founder of the

The view taken in the text has been confirmed by the searching and carefully documented discussion in Batiffol, *Les Conflits de Lois en Matière de Contrats* (1938), Nos. 133, 134. See, generally, Frölicher, *Das Währungsstatut* [*Abhandlungen zum Schweizerischen Recht*, ed. by Guhl, No. 179] (1941).

37. *Cf. Re Chesterman's Trusts*, [1923] 2 Ch. 466, 483 (C.A.); Swiss Federal Tribunal, June 8, 1925, *Amtliche Sammlung* 51 II 303, 308 [also *J.D.Int.* 1926, 1118.]

38. *Supra*, p. 57. Exceptions have been created by international agreements, *infra*, p. 489.

39. *Les Six Livres de la Republique* (1576 ed.), VI, chap. 3, p. 657.

40. *DuCosta* v. *Cole*, Skinn, 268, 90 Eng.Rep. 272 (K.B. 1689; by Holt, J.). The case deals with a bill of exchange drawn on Oporto in Portuguese money. The latter having been devalued before maturity, the maker was held liable for the original value of the Portuguese money. "The King of Portugal may not alter the property of a subject of England."

41. *Cours de Droit Commercial* (3d ed., 1826), V 271. On the historical background of Pardessus' instance see Mees, *De Vi Mutatae Monetae* (Rotterdam 1838) 89.

French science of commercial law. Referring to a case in which a Spaniard had promised a Frenchman 500 Spanish piasters, and depreciated piaster notes were subsequently made legal tender, Pardessus points out that the French creditor does not "owe allegiance" to the Spanish Government and is under no duty to "believe," because of the order of that government, that paper carrying the inscription "good for 500 piasters" is really worth that much. Still the answer is that the French creditor, who did not want to be affected by the fate of the Spanish piaster, should have contracted in terms of the French or another currency or else have safeguarded himself by one of the protective clauses known for centuries. In Pardessus' example the piaster notes, being legal tender, represented valid piasters as owed by the debtor. The case would have been still more graphic if the claimed silver piasters had been withdrawn or seized by the Spanish Government leaving only paper piasters in circulation. But even in the absence of such a measure, the French creditor must receive paper piasters. Pardessus' reasoning suffers from the then backward state of private international law which in the fields of contracts received its decisive impulse a few decades later from Savigny.[42]

However, in the international sphere the actual issue is not so much whether the foreign banknote must be accepted. The issue ordinarily presents itself by the question whether a creditor of foreign currency must put up with depreciation and devaluation of that currency when the latter has to be judicially converted into the currency of the forum. In other words, the problem is whether the "pound for pound" or, generally, the nominalistic rule dominates international as it does internal relations.[43] As a matter of fact, despite Pardessus, the triumph of

42. Through his analysis of the international law of contracts in *System des Heutigen Römischen Rechts* VIII (1849).

43. The writings cited n. 1; *supra*, p. 171, n. 1, and *infra*, p. 414, n. 1, are also pertinent to this point, particularly, those by Neumeyer, Melchior, Guisan, Eckstein, and Domke. See furthermore, Lagarde, *Emission des Titres en France par des Sociétés de Commerce Étrangères* (thesis, Poitiers, 1926) 155; Penciulesco, *La Monnaie de Paiement dans les contrats Internationaux* (thesis, Paris, 1937) 224; Gutzwiller, *Der Geltungsbereich der Währungsvorschriften* (1940) 64, 103. Less helpful, Savatier, "L'influence de variations de valeur des monnaies, etc., *Revue Critique de Droit International*, 1937, 55. The nominalist point of view in international relations was also epoused by the Soviet writer Professor M. J. Pergament, *The Depreciation of Paper Money* (Harbin, 1926), [with an eye to the Chinese situation.] For the Anglo-American literature see *infra*, p. 364, n. 20.

the nominalist rule in regard to foreign currency may be called universal. It was recognized at an early date [44] by the common law courts.[45] Although these courts must invariably convert foreign currency into the money of the forum, fluctuations of that currency between the time of contracting and the law day of conversion are not taken into consideration. The nominalistic theory has also been applied to foreign currency debts by high French,[46] Italian,[47] Dutch,[48] Belgian,[49] Austrian,[50] and by other [51] civil law courts. The French adherence to this group is remarkable as a self-refutation of the French territoriality-of-the-cours-

44. A bill of exchange of 150,000 *livres tournois* drawn on Paris in 1792 was in *Searight* v. *Calbraith*, 4 Dall. 325 (Pa., 1796) allowed to be discharged by payment of assignats.

45. *Die Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926) [marks]; *Zimmermann* v. *Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1926) [Austrian crowns]; *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N.Y. 71, 193 N.E. 897 (1934) [rubles]; *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade*, [1921] 2 A.C. 438 (H. of L.); *in re Chesterman's Trusts—Mott* v. *Browning*, [1923] 2 Ch. 466 (C.A.) [marks]; *Anderson* v. *Equitable Life Assurance Society of the United States*, 42 T.L.R. 302 (C.A., 1926) [marks]; *Buerger* v. *New York Life Ass. Co.*, 43 T.L.R. 601 (C.A., 1927, Lord Scrutton concurring) [rubles]; *Derwa* v. *Rio de Janeiro Tramway, Light & Power Co.*, [1928] 4 D.L.R. 542 (Sup. Ct. of Ontario) [francs]; *Kricorian* v. *Ottoman Bank*, 48 T.L.R. 247 (K.B., 1932) [Turkish pounds].

46. *Cass.*, March 10, 1925, *D.H.* 1925, 237; March 9, 1925, *J.D.Int.* 1926, 103; Jan. 11, 1926, *D.H.* 1926, 65; Feb. 25, 1929, *J.D.Int.* 1930, 1306 [rubles]; April 12, 1927, *J.D.Int.* 1928, 414 [marks]; April 4, 1938, *Sirey* 1938 I 188 [Indo-China piasters].

47. Ital. Cass., March 23, 1925, *R. D.Comm.* 1925 II 320. The obligation to deliver rubles was based upon a sale of rubles, but the rule would obviously have been the same in the case of an ordinary ruble debt.

48. *Hooge Raad*, Jan. 2, 1931, *Nederlandsche Jurisprudentie* 1931, 274 [marks]; App. The Hague, June 8, 1931, *Nederlandsche Jurisprudentie*, 1931, 1499 [Belgian francs].

49. App. Brussels, Jan. 12, 1935, *Pasicrisie Belge* 1935 II 90 [pounds sterling] and numerous other Belgian cases listed by Piret, *supra*, p. 172, n. 1, at secs. 81 *et seq.*, where, however, the nominalistic principle is taken throughout as a matter of course rather than explicitly stated.

50. Supreme Court of Austria, April 24, 1927, *J.W.* 1927, 1899 [marks]; March 12, 1930, *Die Rechtsprechung* 1930, 105 [marks]; Sept. 11, 1929 *J.W.* 1929, 3519 [Polish marks].

51. Supreme Court of Czechoslovakia, Jan. 19, 1934, and Dec. 6, 1934, *Z.A.I.P.* 1936, 172; Swiss Federal Tribunal April 5, 1895, *Amtliche Sammlung*, XXI, 437 [Mexican dollars]; July 1, 1926, *ibid.*, LII (3) 128 (French francs); Mixed App. Alexandria, June 23, 1927, *Revue du Droit Bancaire*, 1928, 356 [rubles]; Nov. 26, 1931, *J.D.Int.* 1932, 505 [French francs].

forcé doctrine.[52] German courts have followed suit with reference to depreciated non-German currencies not regarded as "ruined." [53] Only "ruined" currencies were revalued.[54] But evidently even revaluation presupposes recognition of the depreciation process and its foreign legal basis. The nominalist principle has also been employed with respect to foreign currencies in several awards of the Court of Arbitration of the International Chamber of Commerce in Paris.[55]

Where the foreign currency (dollar, pound sterling) was chosen because of its apparent stability, attempts have been made to read a tacit gold clause into the agreement, but these attempts have proved no less futile in international [56] than in national [57] relations. Nor does public international law offer a remedy to injured creditors. In the absence of a treaty [58] to the contrary the right of a government to resort to inflationary emission of paper money and eventually to currency devaluation is uncontested.[59]

Owing to its international effectiveness, devaluaton may bring a tremendous windfall to debtor countries. An instance is Germany's profit through the devaluation of the pound and dollar and

52. *Supra*, p. 56.

53. *Reichsgericht*, April 6, 1925, *J.W.* 1925, 1986, and Feb. 25, 1926, *ibid.* 1926, 1323 [French francs]; June 28, 1934, *R.G.Z.* 145, 51 [English pounds]; App. Berlin *(Kammergericht)*, Sept. 25, 1928, J.W. 1929, 446.

54. *Infra*, p. 356.

55. See next note.

56. *Cass.*, Jan. 14, 1931, *J.D.Int.* 1931, 126 [loan of the city of Tokyo]; *Hooge Raad*, Jan. 2, 1931, *Nederlandsche Jurisprudentie* 1931, 274; App. Leeuwarden, Nov. 21, 1934, *ibid.* 1935, 333; Alberta Supreme Court, App.Div., in *Brown* v. *Alberta and Great Waterways Railway*, 59 D.L.R. 520 (1921); several awards emanating from various arbitrators of the International Chamber of Commerce, *World Trade* (Paris) 1932, No. 9, p. 10; No. 11, p. 11; 1933, No. 2, p. 10; No. 5, p. 11.

57. *Supra*, p. 240.

58. No clear instance of this has been found. See, however, *infra*, sec. 41, n. 10.

59. An Englishman, holder of American dollar bonds, sued the United States, under the American British Treaty of May 8, 1871, in the American and British Claims Commission, for damages because of the dollar depreciation. The claim was disallowed [*Adams Case*], J.B. Moore, *International Arbitrations* (1898) 3066. The Peace Treaty of Neuilly, following the Treaty of Versailles, Art. 297, granted the subjects of the victorious powers compensation for damages suffered through "extraordinary war measures" of Bulgaria. Nevertheless, the Bulgarian State, on broad grounds, was held not liable for the depreciation of the Bulgarian *leva*. Greek-Bulgarian Mixed Arbitral Tribunal in *Fortouna* v. *Bulgarian State*, *Recueil des Decisions des Tribunaux Arbitraux Mixtes* IX (1925) 374, 450.

later of the guilder and the French franc.[60] In 1936 the Hitler government decreed that within the province of international finance any devaluation of foreign currency had to be carried out in Germany, whatever the law of the currency and regardless of any gold clause.[61] Some months later, it ordered 75% of the "devaluation profits" to be turned over to the government as a special tax.[62]

V. Conflict of Laws—Recasting Rule and Revaluation

Where a new currency is created a recasting rule for debts incurred in the old currency will, it was seen, ordinarily be provided by legislation.[63] The international aspects of this situation have been considered in the Austrian Coupon Cases.[64] One of the problems at bar was whether the Austrian railroad companies had to pay their thaler bonds in marks after Germany had adopted the mark currency on the basis of 3 marks = 1 thaler. The question was answered affirmatively by the German courts,[65] and the theory underlying that answer was later accepted, with respect to other situations, by the Austrian courts which had rejected the application of the German recasting rule to the thaler-mark problem.[66] According to that theory, the state which

60. The profit accrued to Germany through foreign (primarily pound and dollar) devaluation was estimated by German writers, as of the end of 1933, at four to five billion reichsmarks. Grube, *Pfund und Dollar* (1935) 1, n. 1. There are no statistics on the effects in Germany of the ensuing guilder and Swiss franc devaluations and of the German laws of 1936. *Infra*, n. 62.

61. Law of June 26, 1936, *R.G.Bl.* 1936 I 515 and decree of Dec. 5, 1936, *ibid.* 1010, commented on in *Z.A.I.P.* 1936, 391, and by Domke, "La législation allemande, etc.," *Bull. I.I.*, XXXVI (1937), 189, with further references. The 1936 law was translated into English in Foreign Bondholders Committee, *Annual Report, 1937*, p. 421. The phrasing of the law was, perhaps deliberately, vague and obscure, especially in the case of the new term *Abwertung* (depreciation? devaluation? or both?). Another ambiguity of the law was pointed out by the Swiss Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung* 64 II 88, 96.

62. Law of Dec. 23, 1936, *R.G.Bl.* 1936 I 1126 and decree of Dec. 28, 1936, *ibid.* 1151. See Domke, "L'imposition des benéfices de dévaluation dans la nouvelle législation allemande," *Revue de Science et de Législation Financières* 1938, 556.

63. *Supra*, p. 144.

64. *Supra*, p. 126.

65. The German cases are listed *supra*, p. 126, ns. 41, 42, and among them the judgment of the *Reichsgericht* of Feb. 9, 1887, *R.G.Z.* 19, 47, is the most elaborate and forceful. It applies the German recasting rule independently of the requirement partly set up in the prior cases that there be a German place of payment.

66. Supreme Court of Austria, May 24, 1927, *Oesterreichisches Zentralblatt* 1927, 777; December 20, 1927,

has created a given currency must also have power from the international point of view to replace it by another, just as it may alter it; and this conclusion extends to the recasting rule, a necessary incident in the transition to the new currency, provided it is a bona fide rule not purporting to harm foreign creditors.[67]

The problem of the recasting rule becomes more involved if the change of currency is caused by a change of sovereignty.[68] When, through conquest or otherwise, the whole territory is placed under a new sovereign who introduces a new currency, the recasting rule prescribed will apply to all debts which have a primary "contact" with that territory. The legal approach is analogous to the Conflict-of-laws doctrine determining the law governing a contract. If the debt appertains to the territory acquired, a bona fide recasting rule of the new sovereign should be accepted by foreign courts.[69] The same view holds good in the more frequent case in which only part of the territory where the

Juristische Blaetter 1928, 175; Oct. 9, 1930, *Die Rechtsprechung* 1931, 11 at 14. Independently of these cases Austrian writers, too, approved the theory of the German courts as to the recasting rule. Von Schey, *Obligationsverhaeltnisse des Oesterreichischen Privatrechts* (1890) 128; Ehrenzweig, *System des Oesterreichischen Allgemeinen Privatrechts* II, 1 (2d ed., 1928) 27; Walker, *Internationales Privatrecht* (5th ed., 1934) 471.

67. The bona fide requirement is stressed by *Reichsgericht*, March 1, 1882, *R.G.Z.* 6, 125, 133.

A Polish law of Nov. 20, 1919 (German translation in Steiner, *Die Währungsgesetzgebung der Successionsstaaten Oesterreich-Ungarns* [1921] 377) recasting debts couched in terms of German marks into Polish marks, which were then at a considerable discount, on the basis 1:1, was held inapplicable by App. Berlin *(Kammergericht)* because it did not constitute a bona fide recasting rule, Oct. 28, 1922, *J. W.* 1923, 128. See *Reichsgericht*, Jan. 27, 1923, *Warneyers Rechtsprechung* 1923/24, 50 and Dec. 5, 1922, *ibid.* 52, and for particulars, the author's *Das Geld* (1925) 162, and Neumeyer, *Internationales Verwaltungsrecht* III part 2 (1930) 279.

68. Extensively on this, Neumeyer, *supra*, p. 16, at 259.

69. In the former German territory of Tanganyika the English after victory in World War I, replaced the local rupee with a local shilling, and rupee debts were recast accordingly. The *Reichsgericht*, however, refused to apply the recasting rule to contracts between German nationals, irrespective of the strong Tanganyika contacts of the debts in question. *Reichsgericht*, June 3, 1924, *R.G.Z.* 108, 298; Sept. 19, 1923, *R.G.Z.* 107, 121. See also the following decisions of the Mixed Arbitral Tribunals, instituted by the Treaty of Versailles: Feb. 13, 1925, *Recueil des Decisions des Tribunaux Arbitraut Mixtes* V 551, 577 (German-Czechoslovakian M.A.T.); July 15, 1926, *ibid.*, VII, 14 (German-Greek M. A. T.); May 27, 1927, *ibid.*, VII 604 Franco-German M. A. T.). The question is discussed by Neumeyer, *supra*, n. 16, at 274, n. 44.

On an instance of absence of a recasting rule (Bavaria-Tyrol case of 1808) see *supra*, 145.

currency circulates is acquired by the new sovereign.[70] But, in that event, the currency contracted for persists within those parts of the territory which were not acquired by the new sovereign, and this fact may be resorted to by foreign courts in order to maintain the original agreement on the sum owed regardless of the recasting rule.[71]

Revaluation—that is, a recasting rule designed to restore heavily depreciated debts—is of particular significance in the international field. The pertinent problems and cases are preponderantly connected with the revaluation of the German mark, thus illustrating its far-reaching international implications.[72] They differ as they are seen from within or from without the revaluing state.

a) Taking the German example[73] we find that two ways were open to the German courts: all mark debts could be revalued regardless of the proper law of the contract ("law-of-currency" theory), or all debts governed by German law could be revalued regardless of the currency contracted for ("law-of-contract" theory). The monetary character of revaluation led the Court along the first path. The law of contract theory agreed, however, more with the good-faith conception, basic to the German re-

70. On the monetary consequences of the dismemberment of the Austro-Hungarian monarchy in 1918, see *supra*, 133 and Neumeyer, 268, with copious documentation.

71. In former German Southwest Africa, the German currency law was in force; after the territory was mandated to the Union of South Africa, mark debts were recast in terms of pounds. Again, the *Reichsgericht* rejected application of the recasting rule to the Southwest African mark contracts between German nationals, granting "revaluation" instead. *Reichsgericht*, Nov. 28, 1923, *R.G.Z.* 107, 78; Dec. 8, 1930, *R.G.Z.* 131 at 41, 49. The Polish recasting rule for marks was applied between Polish citizens in *Reichsgericht*, Jan. 27, 1923, *Warneyers Rechtsprechung 1923/24, 50.*

A recasting rule deliberately favoring the Czech crown was issued by the Hitler government for the Sudeten Territory after its invasion. Decree of Oct. 15, 1938, *R.G.Bl.* 1938 I 1430.

72. See the writer's *Bilanz der Aufwertungstheorie* (1929); Schlegelberger, "Die Aufwertung im internationalen Privatrecht," *Z.A.I.P.* 1929, 869; Rost, "Das internationale Aufwertungsrecht Polens," *Zeitschrift für Ostrecht* 1929, 1301; Neumeyer, *supra* n. 16 at 350 (very informative); Melchior, *Die Grundlagen des Deutschen Internationalen Privatrechts* (1932) 294, with full references to the numerous German cases; Borsari, *Zur Behandlung der Währungsentwertung und der Aufwertung in der Schweizerischen Rechtsprechung* (thesis, Zurich, 1933); Guisan, *La Dépréciation Monétaire et ses Effets en Droit Civil* (1934) 135 and passim; Pretzel, *Die Aufwertung von Fremdwährungsschulden* (1936).

73. There is still less yield from non-German law. Among the eighteenth century revaluation cases, *Fowl's*

valuation doctrine, and became dominant in German [74] as well as foreign courts. German courts were bound in accordance with that theory even to revalue debts couched in terms of a non-German currency, provided the contract came under German law. The *Reichsgericht,* however, distinguished between depreciated and ruined foreign currencies, granting revaluation only for "catastrophic" depreciation.[75] To the difficulty of making that distinction was added the complication that the creditor, who was entitled to payment, for example, in Austrian crowns, was enabled to obtain a greater amount in Germany than in Austria.

Still, in some cases involving mark debts held by German creditors against non-German debtors, the *Reichsgericht* declared revaluation to be monetary in character and employed the law-of-currency doctrine.[76] Expediency played a distinct part in the

Ex'rs v. *Todd,* 1 Bay 176 (S.C. 1791), presents international aspects. The court refused to extend the statutory devaluation of the South Carolina pound to a bill of exchange drawn from the Bermudas on a South Carolina drawee. The holder suing the drawer was awarded the full silver value as of the time of contracting.

74. *Reichsgericht,* Dec. 14, 1927, *R.G.Z.* 119, 259; Jan. 27, 1928, *R.G.Z.* 120, 70; June 6, 1928, *R.G.Z.* 121, 203; June 21, 1933, *R.G.Z.* 141, 212; Oct. 22, 1929, Zeiler, *Aufwertungsfälle beim Reichsgericht* IX no. 1873; Jan. 14, 1931, *Seufferts Archiv* LXXXV 97, and numerous other decisions cited by Melchior, *Die Grundlagen des Deutschen Internationalen Privatrechts* (1932) 300, n. 1.

75. See judgments of Jan. 27, 1928, and Oct. 22, 1929, cit. in note 74 [Austrian crowns]; App. Berlin, Feb. 20, 1929, *Die Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts im Jahre 1929,* p. 64 [Hungarian crowns]; same court, June 2, 1930, *Leipziger Zeitschrift* 1931, 384 [rubles]. Applying the law-of-contract theory, however, the *Reichsgericht* refused revaluation of Polish marks stipulated in an Austrian contract, on the ground that Austrian law did not allow revaluation. On the other hand the judgment of Dec. 16, 1931, *J.W.* 1932, 1048, imposing German law upon an Austrian crown debt, granted the German creditor revaluation against a foreign bank, although bank accounts were exempt from revaluation *(supra,* p. 213); the court, however, confined the restriction to bank accounts conducted in German marks. Instances of currencies which were non-revaluable, because they were not "ruined", are the Dutch guilder *(Reichsgericht,* March 3, 1925, *Warneyers Rechtsprechung* 1925, 134; April 6, 1925, *J.W.* 1925, 1986) and the French franc *(Reichsgericht,* Feb. 25, 1926, *J.W.* 1926, 1323). For another use by the *Reichsgericht* of the same distinction, see *supra,* p. 135.

76. Judgments of March 5, 1928, *R.G.Z.* 120, 277; March 10, 1928, *J.W.* 1928, 1790; Feb. 9, 1931, *J.W.* 1932, 582. In other cases a place-of-performance theory made its appearance though evidently the substance rather than the performance of the debt was in point. Judgments of June 23, 1927, *R.G.Z.* 118, 370; Dec. 8, 1930, *R.G.Z.* 131, 41. *Supra,* p. 146.

court's rulings. Thus, in the case of a German mark debtor obligated to a Czechoslovakian creditor, the *Reichsgericht* did not challenge the Czechoslovakian refusal of revaluation.[77] But in the case of a Danish owner of Danish, formerly German, real estate, who had tendered the nominal amount of his debt to his German mortgagee and had obtained a Danish judgment that the mortgage be stricken from the land-book, the *Reichsgericht,* reversing the appellate court, refused to recognize the Danish judgment.[78]

The climax of confusion was reached when the *Reichsgericht* decided to grant equitable "readjustment" *(Ausgleich)* where the foreign currency was not "ruined" and therefore not amenable to "revaluation."[79] "Readjustment" and "revaluation" were as alike as two peas.[80] It was all the expression of the bewilderment of a judiciary, which had undertaken a job beyond its means.

b) Placing ourselves now outside the revaluing state we must look to the conflict rules of the forum. Application of the somewhat arbitrary German revaluation rule may have appeared strange to a non-German court, but that difficulty did not amount to a legal impediment. A revaluation law should not be understood to mean that power to revalue is vested solely in domestic courts; on the contrary, foreign courts are expected to carry out revaluation.[81] The law-of-contract theory was used by English,[82]

77. Judgment of Dec. 14, 1927, *R.G. Z.* 119, 259.

78. Judgment of June 25, 1926 *R.G. Z.* 114, 171. *Supra*, p. 215, n. 58.

79. Judgment of June 21, 1933, *R.G. Z.* 141, 212 [pounds]. The same view was applied to dollar debts, after the depreciation of the dollar. Judgment of April 2, 1935, *R. G.Z. 147, 286.* This was strongly criticized by Professor Lambert, *Un Parère de Jurisprudence Comparative* (1934). However, Professor Lambert himself advocates free judicial discretion in the handling of the depreciation problem, indulging in arbitrary distinctions such as "catastrophic" and "non-catastrophic" depreciations. Hence his criticism is unconvincing. See the present writer's review in 44 Yale L.J. 720 at 722, 922 (1935).

80. In a judgment of June 28, 1934, *R.G.Z.* 145, 51, the court, relying on writings of Müge1, confined "readjustment" to bilateral contracts. Annotating the judgment in *J.W.* 1934, 2330, Müge1 protested that the court had misunderstood his views.

81. *Supra*, p. 215, n. 58. The result suggested above was practically reached in *Kornatzki* v. *Oppenheimer*, [1937] 4 All. E.R. 133 (Ch., 1937), although the court's reasoning is disputable. *Supra*, p. 208, n. 23.

82. Revaluation of mark contracts was denied under English law in *Anderson* v. *Equitable Life Assur. Society*, 42 T.L.R. 302 (C.A., 1926), and granted under German law *In Re Schnapper, Westminster Bank Ltd.* v. *Schnapper*, [1936] 1 All. E. R. 322 (Ch.), and in *Kornatzki* v.

Dutch,[83] Austrian [84] and other [85] courts; under it marks were revalued only where the contract was governed by German law. Czechoslovakian and Hungarian courts, regardless of the law controlling, rejected revaluation of mark debts for reasons of public policy.[86] Similarly French courts refused to apply, as "strictly territorial," the Polish revaluation law.[87] In turn, French attempts in 1936 to revalue "international" franc debts did not succeed [88] in the international field. A middle ground was sought by the Swiss courts which revalued mark debts, by application of the "good faith" principle embodied in Swiss law, rather than on the law-of-currency ground.[89] The German revaluation act was applied by them in terms only to dismiss the claim of a German mark creditor against a Swiss bank which relied on the non-revaluation

Oppenheimer, *supra*, where in fact an "adaptable" debt, namely an annuity of familial character was involved. *Re Chesterman's Trusts —Mott v. Browning*, [1923] 2 Ch. 466 (C.A.), used the rule of "mark for mark" in a situation controlled by English law. However, revaluation proper was not allowed at the time of the judgment.

83. Revaluation of mark contracts denied, because German law was not applicable: *Hooge Raad*, Jan. 2, 1931, *Nederlandsche Jurisprudentie*. 1931, 274; Court *Roermond*, Oct. 18, 1934, *ibid.* 1935, 1305, quoting this writer for the use of the nominalistic principle.

84. Revaluation denied under the law-of-contracts theory: Austrian Supreme Court, April 24, 1927, *J.W.* 1927, 1899, and September 11, 1929, *J.W.* 1929, 3519 [regarding Polish marks]; March 12, 1930, *Die Rechtsprechung* 1930, 105 [regarding German marks]. See also judgments of Dec. 1, 1936, and March 24, 1937, *Die Rechtsprechung* 1937, 220 and 221 [unjust enrichment, German marks].

85. Supreme Court of Poland, Oct. 28, 1925, mentioned by Rost, *supra*, n. 72, at 1309, and April 13, 1927, *Zeitschrift für Ostrecht* 1928, 547. A similar result was reached by the Germano-Polish Mixed Arbitral Tribunal, July 16, 1927, *Recueil des Décisions des Tribunaux Arbitraux Mixtes* VII 732, 737 [referring to the law of the place of payment, which was at the same time the proper law of the contract].

86. Supreme Court of Czechoslovakia, Jan. 19, 1934, and Dec. 6, 1934, *Z.A.I.P.* 1936, 172; Supreme Court of Hungary, case of 1930, summarized in *Z.A.I.P.* 1937, 179(4). The significance of these cases, however, is somewhat uncertain. See, also the decision of the Czechoslovakian court Nov. 11, 1924, *J.W.* 1925, 513.

87. App. Paris, April 19, 1928, *J.D. Int.* 1928, 695. A judgment of the Trib. civ. Seine, mentioned by Witenberg, *J.D.Int.* 1929, 593 plainly refers to the "*ordre public*". As a matter of fact the theory of the alleged "territoriality" of the legal tender rule is out of place on this score, *supra*, p. 354.

On "revaluation" in Alsace-Lorraine after World War I, *supra*, p. 215.

88. *Supra*, 266.

89. Judgments of June 3, 1925, *Amtliche Sammlung* 51 II 303; Feb. 17, 1927, *ibid.* 53 II 76; March 26, 1931, *ibid.* 57 II 368; Nov. 13, 1931, *ibid.* 57 II 596. Cantonal courts have repeatedly applied German revaluation law where the contract was governed by German law. Guisan, *supra*, n. 72, at 162 n. 14.

of bank accounts under the German act.[90] On the other hand, the Swiss Federal Tribunal granted retroactive revaluation,[91] flatly rejected by other courts,[92] to German creditors against Swiss debtors. Surprisingly, no questions of revaluation have been presented to American courts in modern times. In the mark cases adjudicated in this country, mark revaluation proper was apparently never pleaded.[93]

In a few instances revaluation problems were settled by international agreements.[94]

90. Judgment of July 3, 1928, *Amtliche Sammlung*, 54 II 314. A minority of the court dissented, in a strong opinion which does not appear from the printed reports. See Borsari, *supra*, n. 72 at 82.

91. Judgments of Feb. 28, 1930, *J.W.* 1930, 1900; Feb. 26, 1932, *Amtliche Sammlung* 58 II 124. In the same sense Austrian Supreme Court June 26, 1930, *J.W.* 1931, 635, and Mixed Tribunal Cairo, Feb. 17, 1930, in *William II* (the former Emperor) v. *Adjourie*, *J.D.Int.* 1931, 467.

92. French Cass., Oct. 19, 1938, *Nouvelle Revue de Droit International Privé* VI 1939, 152; Trib. civ. Seine, April 9, 1930, *J.D.Int.* 1930, 1012; May 26, 1936, *Gazette du Palais* 1936 II 329 [the two latter cases concern mortgages on German real estate]; Supreme Court of Norway, Feb. 2, 1934, cited in *J.D.Int.* 1937, 930; Court Geneva, May 31, 1930, *Revue de Droit International Privé* 1930, 385, 395; Court Amsterdam, Dec. 10, 1928, *Nederlandsche Jurisprudentie* 1929, 125; Court Rotterdam, June 30, 1930, *Blätter für Internationales Privatrecht* 1931, 212.

93. In *Die Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926), involving a mark debt under German law, revaluation was not taken into account. Yet no reasons of public policy were underlying. The plaintiff seems not to have mentioned revaluation, possibly because of the rule that bank accounts were not revaluable (*supra*, p. 213). In *Hicks* v. *Guinness*, 269 U.S. 71, 46 S.Ct. 46, 70 L.Ed. 168 (1925) American law was held controlling.

94. Especially between Germany and Poland in 1928, *R.G.Bl.* 1929 II 577; 1931 II 33. The Germano-Polish Convention of 1922, Art. 306ff (Kaeckenbaek, *The International Experiment of Upper Silesia* [1942] 567ff.) deals with the monetary régime in Polish Upper Silesia, but these provisions apparently did not give rise to revaluation problems. The Germano-Polish Mixed Arbitral Tribunal, April 26, 1930, *Amtliche Sammlung der Entscheidungen des Schiedgerichtshofs für Oberschlesien* VII (1938) 112, declined to take jurisdiction in a revaluation case. The Franco-German accord of May 10, 1926, *J.D.Int.* 1927, 1272, was merely concerned with the revaluation of German public loans.

The clearing procedure of the Treaties of Versailles St. Germain, Trianon, and Neuilly tended toward a kind of revaluation though under a different legal theory. *Infra*, p. 518, n. 25.

Section 25

DISCHARGE OF FOREIGN CURRENCY DEBTS IN LOCAL MONEY

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I. "Money of Contract" and "Money of Payment"

Where a debt is contracted in a money other than that of the place of payment, the law of that place frequently provides that in the absence of an expressed stipulation to the contrary, the debtor may make a payment in local currency equivalent to the sum contracted for in the debt. This "local-payment" rule merely gives a privilege to the debtor, and does not entitle the creditor to demand payment in local money.[1] Since, however, the debtor will ordinarily avail himself of the privilege, the result is a diminution, desirable in the public interest, of the demand for foreign money.

The "local-payment" rule first developed in the continental bill of exchange law [2] and was carried over to continental commercial law [3] and partly into the general law of contracts;[4] it was

1. Italian Cass., June 9, 1923, *Foro Italiano* 1923 I 796; Swiss Federal Tribunal, June 27, 1918, *Amtliche Sammlung* 44 II 213. This is an old doctrine. Ludovico Scaccia in *De Commerciis et Cambiis* (1619) points out that payment in local currency is *in solutione* rather than *in obligatione* (sec. 2, gl. 5, no. 185, 188). The rule operates in favor of foreign residents also. See App. Paris, Jan. 29, 1923, *D.P.* 1923 II 129.

2. Data on the history of the rule are given by L. Goldschmidt, *Handbuch des Handelsrechts* (1868) 1153 n. 35 and by Ascarelli, *La Moneta* (1928) 24; *id.*, *Saggi Giuridici* (1949) 237, 242. The legal systems which have adopted the rule are listed by Felix Meyer, *Weltwechselrecht* I (1909) 290, and Vivante, *Trattato di Diritto Commerciale* IV (5th ed., 1935) no. 1566, n. 106. Among the laws which have explicitly taken over the rule may be cited the German *Wechselordnung* (1849) 37, the Swiss Law of Obligations 756, and the Scandinavian Bill of Exchange Law (1880) 35. See also *Barry Colne and Co.* v. *Jackson Ltd.*, [1922] S.Afr.L.R., Cape Prov.Div. 372, (Sup.Ct. South Africa, 1922), decided under the Roman-Dutch law.

3. For instance, into the Italian Commercial Code of 1882 (abrogated in 1942) Art. 39.

4. See German Civil Code 244; Italian Civil Code of 1942, Art. 1278;

formulated with particular care in the 1930 Geneva Uniform Laws on Bills of Exchange and on Checks.[5] It appears also in the English *Bills of Exchange Act, 1882*, § 72(4), and is in accord with American business custom in the field of negotiable instruments.[6] Where the contract is intended to deprive the debtor of this privilege, the phrase customarily used is that "effective" payment shall be made in the foreign currency,[7] but such a provision may be rendered inoperative by exchange-control in force at the place of payment. Generally speaking, in a Conflict-of-Laws situation, the law and custom of the place of payment will determine whether or not the debtor is entitled to make payment in the local currency, since this is merely a question of "manner of payment".[8]

Supposing the "local-payment" rule to prevail in the forum, the next question is whether the rate of conversion from foreign into local currency should be determined as of the date of maturity or of actual payment. Both theories have followers. In examining this problem, it must be borne in mind that under civil

Swiss Law of Obligations 84, par. 2; Austrian decree of the Minister of Finance, May 21/June 2, 1848, *Justiz-Gesetzessammlung*, no. 1152; see Austrian Supreme Court, April 26, 1922, *Rechtsprechung* V (1924) 53.

5. The Geneva Uniform Law on Bills of Exchange, League of Nations, *Treaty Series* CXLIII 257, Art. 49, reads as follows: "(I) when a bill of exchange is drawn payable in a currency which is not that of the place of payment, the sum payable may be paid in the currency of the country, according to its value on the date of maturity. If the debtor is in default, the holder may at his option demand that the amount of the bill be paid in the currency of the country according to the rate on the day of maturity or the day of payment. (II) The usages of the place of payment determine the value of foreign currency. Nevertheless the drawer may stipulate that the sum payable shall be calculated according to a rate expressed in the bill. (III) The foregoing rules shall not apply to the case in which the drawer has stipulated that payment must be made in a certain specified currency (stipulation for effective payment in foreign currency)." By giving the creditor the choice (Rule I second sentence) the day-of-payment theory has been adopted to all practical intents and purposes.

The same rule is found in the Uniform Check Law, League of Nations, *Treaty Series* CXLIII 355, Art. 36. As to ratifications of the Geneva Laws, see League of Nations, *Official Journal, Special Supplement* 1939-1946, p. 76.

6. The Draft Code of Commercial Law (1948), *supra*, p. 345, n. 21, at Art. III § 106(2) gives the creditor likewise a right to local currency. The French rule, *infra*, n. 66, is similar.

7. The term has been adopted by the Geneva Uniform Laws. The Draft Code of Commercial Law allows payment in local currency only.

8. *Supra*, p. 146; *infra* 376.

law the debtor in the case of *mora* (default) is liable for damages.[9] Therefore under the time-of-payment rule, if the currency contracted for declines after the maturity of the debt, the creditor will receive not only the equivalent of the nominal amount at the day of payment, but also the difference between that equivalent and the equivalent as of the date of maturity. On the other hand, the creditor, under the time-of-maturity rule, will receive the benefit of any rise of the foreign currency, relative to the local currency, that may occur after the date of maturity.

Consequently the same result will ordinarily be reached under either theory in case the foreign currency should depreciate relatively to the local currency after the day of maturity. The creditor will invariably obtain the equivalent as of the day of payment; since even under the day-of-maturity theory, he will obtain in addition to the equivalent as of the time of maturity, damages for delay between maturity and payment. Conversely, if the local currency depreciates after maturity, the loss incurred by the creditor under the time-of-payment rule will be made good. The clash between the two theories becomes apparent where the default of the debtor is excused as, for example, when non-payment is due to war or revolution.[10] Besides, plaintiffs, for one or another reason, do not always contemplate the question of damages for delay.[11]

The great majority of countries adhere to the time-of-payment theory.[12] This is the desirable course because even if the debtor is

9. Limitation of damages to legal interest does not apply in this case, *supra*, p. 159.

10. The French Civil Code 1147 and the Italian Civil Code of 1942 Art. 1218 (Art. 1225 of the Code of 1865) only allow excuses based on circumstances beyond the debtor's control. The attitude of the German courts is also very strict. *Reichsgericht*, April 12, 1918, *R.G.Z.* 92, 376.

11. App. Paris, Oct. 31, 1922, *Gazette du Palais* 1922 II 666, is an instance. Cf. also App. Nancy, July 25, 1922, *ibid.*, 1922 II 589.

12. *Reichsgericht*, Feb. 20, 1920, *R. G.Z.* 98, 160, and Assembled Senates, Jan. 24, 1921, *R.G.Z.* 101, 312, both approving this writer's suggestions in *J.W.* 1920, 13. [In the case of bills of exchange, however, the time-of-maturity theory was adopted because of the language of the law, *Reichsgericht*, July 1, 1924, *R.G.Z.* 108, 337, March 17, 1925, *ibid.* 110, 295]; Austrian Supreme Court, Apr. 25, 1922, *Rechtsprechung* V (1922) 17; Feb. 27, 1934, *ibid.* 1934, 64 [mortgage in terms of foreign currency; public sale of mortgage; conversion as of the day of payment rather than of the day of sale]; App. Ghent, May 17, 1921, *Pasicrisie Belge* 1921 II 110; App. Brussels, June 8, 1921, *ibid.*, 1921 II 111; App. Florence, July 13, 1937, *Bull. I.I.* XLI (1939) 64; App. Nauplia (Greece) 1938, *J.D.Int.* 1939, 450; Mixed App. Alexandria, Jan. 8, 1930, *Revue de Droit Maritime Comparé* XXIII (1931) 279; App. Buenos

not in technical default the creditor should get the full value contracted for.[13] As the Swiss Federal Tribunal well put it, the local-payment rule bears upon the "how" rather than upon the "how much" of the payment.[14] Italian law, however, follows the day-of-maturity rule.[15]

Because of the uncertainty of the law, the International Law Association, in 1926, suggested the incorporation into international contracts of a clause designed to provide a clear and common basis for the payment of foreign money debts (*Vienna Rules*, 1926).[16] Despite the laborious preparation and discussion of the

Aires, Commercial Division, Sept. 30, 1924, *ibid.* X (1925) 72. The French courts have followed the same line, *Cass.*, Nov. 8, 1923, *J.D. Int.* 1923, 576; Dec. 5, 1927, *J.D. Int.* 1928, 660; March 19, 1930, *ibid.* 1931, 1082; July 8, 1931, *ibid.* 1932, 721; App. Paris, Oct. 18, 1922, *ibid.* 1924, 119; July 15, 1925, *ibid.* 1926, 658. In 1937, however, probably under the pressure of the breaking franc, the *Cour de Cassation* turned to the time-of-maturity theory, Feb. 17 (13 ?), 1937, *J.D.Int.* 1937, 766, while for obligations of a depositary the time-of-payment rule was maintained by *Cass.*, July 25, 1938, *J.D.Int.* 1939, 95. For discussions of the controversy see Hubrecht, *Stabilisation du Franc et Valorisation des Créances* (1928) 310; Scaduto, *I Debiti Pecuniari e il Deprezzamento Monetario* (1924) 120.

Congress has availed itself of the time-of-payment rule in the Private Bill of March 17, 1937 (c. 44), 50 Stat. 928 [payment to an Australian company of a sum equivalent at the rate of exchange at the time of payment to £101 of Australian currency].

13. This rule, however, does not apply if the debtor made a good tender on the day of maturity. *Reichsgericht*, Dec. 12, 1924, *J.W.* 1925, 470 [unnecessarily requiring appropriation of the money to be tendered]. The same theory seems to be the ratio decidendi in *Arbuthnot* v. *Read*, House of Lords 1731/32, 24 *House of Lords Journal* 54b *supra*, p. 263 n. 5. Similarly, if a check in foreign currency is presented to the bank after the period for collection has expired the holder is not entitled to the premium resulting from a subsequent appreciation of the foreign currency. *Cass.* Nov. 10, 1926, *J.D.Int.* 1927, 699.

14. Swiss Federal Tribunal, June 27, 1918, *Amtliche Sammlung* 44 II 213; May 23, 1928, *ibid.* 54 II 257; Feb. 11, 1931, *ibid.* 57 II 69. The language of this court is sometimes in terms of day of maturity; however, where the foreign currency had depreciated after maturity of the debt, damages—equal to this decline—were awarded in case of the debtor's default. Swiss Federal Tribunal Oct. 26, 1920, *Amtliche Sammlung* 46 II 375; May 3, 1921, *ibid.* 47 II 190; Oct. 25, 1921, *ibid.* 47 II 438; Jan. 30, 1922, *ibid.* 48 II 74, Oct. 10, 1934, *ibid.* 60 II 337.

15. Ital. Civil Code of 1942 Art. 1278, but the debtor paying lire tardily is liable to damages, *supra*, p. 159, n. 13. This conforms virtually to the former law. Ital. Cass., Jan. 15, 1924, *Foro Italiano*, 1934 I 391; July 20, 1936, *ibid.*, 1936 I 1118; March 29, 1938, *J.D.Int.* 1939, 182; cf. also Feb. 4, 1938, *ibid.* 1939, 179.

16. International Law Association, *Report of the 34th Conference* (Lon-

clause it has met with no success. Its highly complicated structure reconciled the conflicting views within the association but failed to arouse the attention of the business world. It has probably never been used in actual contracts. The problem is obviously one to be solved by legislative or judicial methods.[17] The Geneva Laws on Bills of Exchange and Checks are instances.

Whatever the date of conversion, the money stipulated *(monnaie de contrat)* and the money in which payment is made *(monnaie de payement)* must be clearly distinguished. The "money of contract" is the determining factor, and its fluctuations decide the financial fate of the transaction. The "money of payment" on the other hand, has only a technical importance; its fluctuations up to the time of payment are irrelevant, at least if the time-of-payment theory is followed.[18] The proposed amendment to the American Negotiable Instruments law, while recognizing the "local payment" rule,[19] contrasts the "amount expressed in terms of [foreign] money" (the money of contract) with the "*medium* of payment" (money of payment). The same provision also refers to a "particular *medium* in which payment is to be made." While in its first use "medium" refers to a currency, or to a monetary system, as distinct from the monetary system referred to in the contract (the money of contract), in its second use the word signifies a special group of constituents of a given monetary system. This ambivalence is undesirable.

II. The Common Law Rule on Compulsory Conversion

The dominant feature of the common law of foreign currency debts is compulsory judicial conversion.[20] This practice devel-

don, 1926) 543; Stourm, "Les Règles de Vienne," *Revue de Droit Maritime* XIV (1926), 52; *ibid.* XV (1927), 18; Muller, "Les Règles de Vienne, 1926," *Bull. I.I.I.* XVII (1927); *J.D.Int.* 1926, 1139; this writer, *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928) 65, 94.

17. For a criticism of the rules, see *Vertraglicher Schutz supra* n. 16. Unfortunately, the fate of the Vienna Rules is by no means unique in the field of international legal endeavor.

18. Sometimes the "money of contract" is called "money of account," but it is customary to reserve the latter term for another concept. *Supra*, p. 16. In French, "money of payment" and "money of account" (*monnaie de compte* are contrasted in an entirely different sense, the latter meaning the monetary unit: in this juxtaposition "money of payment" means currency. The antithesis is misunderstood by Swiss Federal Tribunal, Feb. 11, 1931, *Amtliche Sammlung* 57 II 69, citing the guinea as an instance of "money of account" in the unit sense. "Guinea," however, is only another name for twenty-one shillings.

19. *Supra*, n. 6.

20. Analyses of the many cases and varying viewpoints may be found in McCormick, *Damages* (1936)

oped in the Middle Ages. The creditor had a choice between two actions; he could sue the debtor for the foreign money in "debt in the *detinet*",[21] or in the ordinary action of debt for its equivalent in English money.[22] The rule that judgment must be given in terms of domestic currency resulted, it seems, from the obsolescence of the former action. It was "received" by the American colonies which substituted pounds of their own for the pound sterling.[23] When the American dollar was created the use of the dollar unit in judgments was ordered by the monetary Act of 1792 [24] and by various State acts long buried in oblivion.[25]

190; Mann, supra p. 1, n. 1, at 288; Gluck, "The rate of exchange in the law of damages," 22 Col. L.Rev. 217 (1922); Negus, "Rate of exchange in reference to foreign debts," 40 L.Q.Rev. 149 (1924); Rifkind, "Money as a device for measuring value," 26 Col.L.Rev. 559 (1926); Drake, "The proper rule in fluctuating exchanges," 28 Mich.L. Rev. 229 (1930); Fraenkel, "Foreign moneys in domestic courts," 35 Col.L.Rev. 360 (1935); Pasching, "Geldentwertung und Verzögerungsschaden," *Mitteilungen des Verbandes Österreichischer Banken und Bankiers*, 1934, 37; Notes, 75 U. of Pa.L.Rev. 448 (1927); 172 Law Times 317 (1931); 80 A.L.R. 1374 (1932). Conversion of a refund payable exclusively in Germany was denied in *Re Parana Plantations Ltd.* [1946] 2 All.Eng. R. 214 (C.A.). Concerning foreign currency problems in unliquidated claims (on tort or other grounds), see *infra*, sec. 28.

21. Y.B. 34 Hen. VI, 12 (Mich.T. pl. 23, 1455); *Rands* v. *Peck*, Cro.Jac. 618, 79 Eng.Rep. 527 (1622). This long-defunct action, closely related to detinue (cf. Blackstone III *156), entitled the plaintiff to a conditional judgment for the foreign money or damages, the latter to be assessed by the jury, or in case of a default or decision on demurrer by an inquest. Y.B. 11 Henry VII, 5 (Mich.T. pl. 20, 1495); *Bagshaw* v. *Playn*, Cro.Eliz. 536, 78 Eng.Rep. 783 (1590).

22. The creditor's right to elect between the two remedies was recognized in *Willshalge* v. *Davidge*, 1 Leon. 41, 74 Eng.Rep. 38 (Exch. Ch., 1586) and *Ward* v. *Ridgwin*, Latch 84, 82 Eng.Rep. 286 (1625). The use of assumpsit for foreign currency claims seems to belong to a later period. See *Harington* v. *Macmorris*, 5 Taunt. 228, 128 Eng. Rep. 675 (Common Pleas, 1805).

More recently in *Richardson* v. *Richardson*, [1927] P. 228 (Prob.Div.), involving the recovery of an account opened by the foreign branch of an English bank in the local currency, the Court pointed out that damages for breach of contract rather than debt was the cause of action; this view was apparently inspired by the fact that the bank had allegedly refused to transfer the account to its London establishment.

23. *Infra*, sec. 40 V.

24. § 20, 1 Stat. 246 at 250, 31 U.S.C. 371. This section seems never to have been relied upon even where the conversion rule was explicitly set out by Federal courts. See *e. g.*, *Frontera Transportation Co. v. Abaunza*, 271 F. 199 (C.C.A. 5th, 1921).

25. *Infra*, sec. 41 n. 42.

Hence the problem of foreign currency debts is by no means new, although its greatest importance came after World War I because of the repercussions of the world monetary crisis upon international contractual relationships. At once the question of determining the date of conversion, which had been neglected in earlier cases, came to the fore.[26] In practice, the controversy turned about the choice between the day of the breach of contract which is ordinarily coincident with the day of maturity ("breach-day rule") and the day of the judgment ("judgment-day rule").[27] English[28] and New York courts[29] have generally adopted the

26. Determination of the rate of exchange itself is a point of fact, pertaining to the jury, *Comstock* v. *Smith*, 20 Mich. 338 (1870), and not a matter of judicial notice. Cf. *Farmer* v. *Orme*, 131 Cal.App. 628, 21 P.2d 977 (1933). Under the early common law the matter of damages was generally left to the jury, judicial supervision being very slight, Washington, "Damages in contract at common law", 42 Law Q.Rev. 345 at 346, (1931). The problem of the date of conversion was, however, occasionally discussed in the action for non-delivery of grain rents. *Supra*, p. 300, n. 2.

27. If the conversion is made by the jury, the trial day rule is substituted for the judgment day rule. The courts sometimes use these concepts interchangeably. *Marburg* v. *Marburg*, 26 Md. 8 (1866); *Hawes* v. *Woolcock*, 26 Wis. 629 (1870); *Sirie* v. *Godfrey*, 196 App. Div. 529, 188 N.Y.S. 52 (1921). See also *Indian Refining Co.* v. *Valvoline Oil Co.*, 75 F.2d 797 (C.C.A. 7th, 1935). *Cropper* v. *Nelson*, Fed. Cas.No.3417 (1811), was decided on a pure trial day theory.

28. *Barry* v. *Van den Hurk*, [1920] 2 K.B. 709 (K.B., 1920); *Lebeaupin* v. *Crispin*, [1920] 2 K.B. 714 (K.B., 1920). *Cf. Di Fernando* v. *Simon*, [1920] 3 K.B. 409 (C.A., 1920). In the actions for a liquidated sum the judgment day rule was first applied in this situation, *Cohn* v. *Boulken*, 36 T.L.R. 767 (K.B., 1920) [trial day], see Fraenkel, "Foreign moneys in domestic courts", 35 *Col. L.R.* 360, at 379-382 (1935), but later on the breach-day rule was employed *In re British American Continental Bank*, [1922] 2 Ch. 575 (C.A., 1922) [claim in the winding-up of a company]; *Uliendahl* v. *Pankhurst*, 39 T.L.R. 628 (K.B., 1923); *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166 (K.B., 1924); *Ottoman Bank* v. *Chakarian*, [1930] A.C. 277 (Pr.C. 1930), *Madeleine Vionnet* v. *Wills* [1940] 1 K.B. 72 (1939). Also in favor of the breach-day rule, the Scottish case *Macfie's Judicial Factor* v. *Macfie*, 1932 Sc.L.T. Rep. 460 and *McDonald* v. *Wells*, 45 C.L.R. 506 (High Court of Australia, 1931). See on the English cases Mann, *supra*, n. 20, at 288; id., 56 L.Q.Rev. 150 (1940). However, one might question Dr. Mann's statement that *Bertram* v. *Duhamel*, 2 Moo.P.C. 212, 12 Eng. Rep. 984 (1838) seems to favor the judgment-day rule.

29. *Hoppe* v. *Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1923); *Kantor* v. *Aristo Hosiery Co., Inc.*, 222 App.Div. 502, 226 N.Y.Supp. 582 (1928), *aff'd* 248 N.Y. 630, 162 N.E. 553 (1928); *Sokoloff* v. *National City Bank*, 250 N.Y. 69, 164 N.E. 745 (1928). The courts may have been influenced by the able article, *supra*, n. 20, of Mr. Gluck, who advocated the breach-day rule.

The breach-day rule has also been used in *Butler* v. *Merchant*, 27 S.W.

first rule, assimilating the situation to the case of a non-delivery of commodities owed.[30] The Supreme Court of the United States, however, in *Deutsche Bank Filiale Nurnberg* v. *Humphrey*,[31] ruled in favor of the judgment-day rule where the debt is payable outside the United States.[32] Mr. Justice Holmes, who delivered the opinion of the Court, pointed out that a foreign-currency debt payable in the United States falls under the power of American law as soon as the time of maturity arrives, and is thus converted into a dollar debt; if, however, the debt is payable outside the United States, the conversion rule of American law comes into play only when the case is adjudicated by the Ameri-

193 (Texas, 1894) [regarding depreciated Mexican currency].

30. Some special applications of the rule may be listed here. If enforcement of a foreign judgment is applied for, the day of rendition of this judgment has been considered as the "breach day", *Lloyd Royal Belge* v. *Louis Dreyfus & Co.*, 27 Lloyds L.R. 288 (C.A., 1927); *Re MacDonough-Werfa*, Am.Mar.Cas. 1934, 234 (D.C.S.D.N.Y., 1934). In a case where a bequest in foreign money was made for keeping burial ground and monument in repair, the day of maturity according to the law of bequests (first anniversary of the death of the testator) was held the day of conversion, *In re Eighmie-Colbourne* v. *Wilks*, [1935] Ch. 524 (Ch., 1935). If bonds are called for redemption at a certain date, they may be presented later; the day of presentation, if payment is not made, is the breach day, *Gatineau Power Co.* v. *Crown Life Ins. Co.*, [1945] S.C.R. 655 (Supreme Court of Canada, 1945). On conversion day in insurance see *infra*, n. 373, n. 59.

31. 272 U.S. 517, 47 S.Ct. 166, 71 L. Ed. 383 (1926). The language of the decision creates the impression that the day on which the suit was brought was the law day. The record of the case, however, indicates that the judgment day was meant *Royal Ins. Co.* v. *Compañia Trasatlantica Española*, 57 F.2d 288, 292 (E.D.N.Y.1932). Accordingly, the case has always been regarded as adopting the judgment-day rule. (Fraenkel, *supra*, n. 20, at 385.) The opinion suffers more from another obscurity. It is not clear whether the place of payment or the applicable law is the criterion of the distinction. The language suggests the latter, but the former probably conforms more to Mr. Justice Holmes' idea, as appears from *Hicks* v. *Guinness*, 269 U.S. 71, 46 S.Ct. 46, 70 L.Ed. 168 (1925), where he used the breach-day rule on the ground that the debt was payable within the United States.

The creditor Humphrey was later compensated for the depreciation loss by the Mixed Claims Commission, United States and Germany, on the basis of arrangements under the Peace Treaty of 1921. He received 16 cents for each mark. Hackworth, *Digest of International Law* V (1943) 735.

The *Guinness* and the *Deutsche Bank* cases taken together represent the latest theory of the Supreme Court. In *Sutherland* v. *Mayer*, 271 U.S. 272, 46 S.Ct. 538, 70 L.Ed. 943 (1926), where the situation was comparable to the *Deutsche Bank* case the court still used the breach-day rule.

32. The opinion rendered by Judge Learned Hand in the court of first resort (*Guinness* v. *Miller*, 291 F.

can court.[33] The Restatement, Conflict of Laws, has adopted this distinction.[34]

768 [S.D.N.Y.1923]) has become notable in the American theory of private international law. Judge Hand there rejected the conception that a court in Conflict cases is called upon to enforce rights created under a foreign sovereignty ("vested rights" theory); instead, he points out, the forum merely creates a right of its own "as nearly homologous as possible" to the right created by the foreign law ("local law" theory). The assertion of this tenet is probably to be explained, at least genetically, in terms of the compulsory conversion rule applied by the court. The contrast between the two theories, however, was elaborated by later discussions independent of that connection. Cf. the writer's *Principles of Private International Law* (1942) 35. Adjudication of the *Guinness* case itself, regardless of its outcome, is certainly not predicated upon the adoption or rejection of one or the other of the two theories which in fact were not touched upon by the Supreme Court.

33. This was followed in *Zimmermann* v. *Sutherland*, 274 U.S. 253, 47 S.Ct. 625, 71 L.Ed. 1034 (1926); *Thornton* v. *National City Bank*, 45 F.2d 127 (C.C.A.2d, 1930); *Tillman* v. *Russo-Asiatic Bank*, 51 F.2d 1023 (C.C.A.2d, 1931), *cert. denied*, 285 U.S. 539, 52 S.Ct. 312, 76 L.Ed. 932 (1932); *Royal Ins. Co.* v. *Compañia Trasatlantica Española*, 57 F.2d 288 (E.D.N.Y.1932), see also *Matter of King's Estate*, 129 Misc. 244, 221 N.Y.S. 730 (1927). The distinction made by the Supreme Court is by no means novel. It was explicitly used as early as 1731 by the Court of Chancery in *Arbuthnot* v. *Read*, *supra*, n. 13. The case involved a debt, payable in France in French money, which had appreciated after maturity. The decree ordered conversion as of the judgment day because the debt was payable in France. Judgment was reversed by the House of Lords, probably on other grounds, see n. 13. Cf. also *Manners* v. *Pearson and Son* [1898] 1 Ch.Div. 581 (C.A.) [The problem of the Parana case, *supra*, n. 20, was different].

Early American cases holding the actual rate of exchange rather than the mint par to be applicable not infrequently refer to the trial day or judgment day where the debt was payable in a foreign country. *Taun* v. *Le Gaux*, 1 Yeates (Pa.) 204 (1793); *Smith* v. *Shaw*, Fed. Cas.No.13,107 (C.C.Pa.1808); *Lee* v. *Wilcocks*, 5 S. & R. (Pa.) 48 (1819) [debt probably payable abroad]; *Grant* v. *Healy*, Fed.Cas. No.5,696 (C.C.Mass.1839); *Marburg* v. *Marburg*, 26 Md. 8 (1866); *Hawes* v. *Woolcock*, 26 Wis. 629 (1870). More recent cases based on the same distinction are *The Hurona*, 268 F. 910 (S.D.N.Y.1920); *Sirie* v. *Godfrey*, 196 App.Div. 529, 188 N.Y.S. 52 (1921); *Liberty Nat. Bank of New York* v. *Burr*, 270 F. 251 (1921); *Metcalf Co.* v. *Mayer*, 213 App.Div. 607, 211 N.Y.S. 53 (1925). Text writers adopted the same position up to about 1920. Wharton, *Conflicts of Laws* II 3d ed., 1905), nn. 514–17; Westlake, *Private International Law* (5th ed., 1912), sec. 226 (but see the 7th ed., 1925); Sutherland, *Damages* I (4th ed., 1916), sec. 213.

A judgment-day rule has been properly used in a case enforcing a Canadian decision, *Farmer* v. *Orme*, 131 Cal.App. 628, 21 P.2d 977 (1933) [day of the judgment of the American trial court].

34. Restatement *Law of Conflict of Laws* (1934), §§ 423, 424.

The English and American cases have generally arisen when foreign currency had depreciated in terms of the local currency; the breach-day rule therefore favored the plaintiff who in these proceedings was frequently a foreigner drawing a considerable windfall from it.[35] In a few cases, however, the currency contracted for had apppreciated after the "breach-day" in relation to the dollar,[36] and the use of the day of breach rule resulted in loss to the foreign plaintiff. On the whole it is surprisingly seldom that the depreciation of the English pound or of the dollar has been passed on by common law courts.

Conversion operates only after it has been ordered by the court. The debtor may, even subsequent to the breach-day, discharge his debt, by payment or otherwise, in the depreciated currency contracted for if the court has not yet spoken.[37] An English case, *Madeleine Vionnet* v. *Wills*,[38] has recently confined this privilege of the debtor to the time preceding the bring-

35. As in the Portuguese Banknote case, *supra*, 84, and the Arcos case, *infra*, p. 481.

36. *Page* v. *Levenson*, 281 F. 555 (D. C.Md., 1922); *Sulka* v. *Brandt*, 154 Misc. 534, 277 N.Y.S. 421 (App. Term, 1935).

37. *Zimmermann* v. *Sutherland*, *supra*, n. 33; *Société des Hotels Le Touquet Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451 (C.A., 1921), cited in the *Deutsche Bank* case; see also *Sirie* v. *Godfrey*, *supra*, n. 33, and *The Baarn*, [1933] P. 251 (C.A., 1933). This rule worked out in the reverse way in *Matter of James*, 248 N.Y. 1, 161 N.E. 201 (1928). The plaintiff had sued in France upon a New York judgment and had secured a French decree of exequatur on a sum of francs calculated according to the rate of exchange prevailing at the date when the French proceedings were instituted. The defendant subsequently paid the sum in depreciated francs. On suit brought in New York it was held that the New York judgment was merged into the French decree and satisfied by payment in francs, so as to preclude further action thereon in New York. It is strange that a New York court should submit to an alteration by a French court of a New York judgment; still the adjudication seems justifiable on the ground that the plaintiff in the French court by converting the dollars into francs was estopped from again demanding dollars. Increase of a franc amount awarded by a French judgment was rejected despite the subsequent depreciation of the franc, in *United States National Bank* v. *United States*, 23 F.2d 927 (1928) in (S.D. Texas), advancing a somewhat confused opinion.

The question whether depositing of the sum due with the Court, or any other acts, discharge the debt, is controlled by the law governing the debt, at least where that law is, at the same time, the *lex loci solutionis*. *Zimmermann v. Sutherland*, *supra*, *and The Baarn*, *supra*. Depositing the sum owed with a financial institution under exchange control or war emergency laws is a different proposition. *Infra*, pp. 452, 458.

38. [1940] 1 K.B. 72 (C.A.1939), criticized by Mann, 56 L.Q.Rev. 140.

ing of the suit. There is no compelling force in that limitation,[39] though it is perhaps desirable from the viewpoint of the breach-day theory.

III. Critique of the Common Law Rule

Compulsory conversion of foreign currency debts has sometimes been considered a matter of course in this country.[40] However, there is no logical impediment to a judgment being phrased in terms of a sum of foreign currency or in terms of the equivalent, at the time of collection, of such a sum. As a matter of fact, the Anglo-American rule results in a sweeping change of the contract, completely overriding the intent of the parties which is generally considered the law of the contract. If the parties have for good reasons phrased their agreement in terms of pounds sterling, and suit is brought in an American court, possibly because the debtor has moved from England to the United States, the court will hand down a dollar judgment, thus subjecting the parties to a monetary risk entirely different from that intended. If subsequently the pound rises in relation to the dollar, the creditor will be the victim; in the case of a decline of the pound, the debtor will suffer.[41] The debtor is usually better off, however, inasmuch as until judgment is rendered he may gamble at the expense of the creditor, either making payment in the contractual currency, or allowing the court to pass judgment, depending on developments in the foreign exchange market. When the pound sterling offered particular assurances of stability, bringing suit in the English courts was especially attractive to foreign plaintiffs able to submit the case to English jurisdiction.[42]

To be sure, conversion into the local currency is usually inevitable in enforcing a judgment for payment of foreign money,

39. The contrary view has been convincingly taken in *Transamerica General Corp.* v. *Zunino*, 82 N.Y.S. 2d 595 (Sup.Ct.1948).

40. See Note, 26 Col.L.Rev. 209 (1926).

41. The compulsory conversion rule of the common law has also been extensively criticized by Mann, supra, p. 1, n. 1, especially at pp. 306 et seq. On pp. 288 et seq., Dr. Mann shows the extreme difficulty, if not the impossibility, of reconciling the theories used in the various English cases.

42. This was particularly true in the case of *The Baarn*, *supra*, n. 37, where the Chilean plaintiffs succeeded in a suit against the Dutch shipowners for pounds sterling in the English courts, whose jurisdiction they had reached by way of attachment. Similar advantages were offered by the American rule. However, when a plaintiff, who had collected a French judgment in francs at an unfavorable rate, tried to recover the difference in an American court, he failed. *United States Nat. Bank* v. *United States*, 23 F.2d 927 (S.D.Tex.1928). The exception of *res judicata* prevailed.

since compulsory liquidation of the debtor's property at public sale will yield local currency. In order to secure to the creditor exactly what is due him, conversion should be made as of the day of collection. This suggests that judgments be expressed in an amount of the local currency equivalent at the time of collection to an amount of foreign currency definitely indicated in the judgment. An American judgment, for instance, would run this way: defendant is liable to pay so many dollars as at the time of collection will be equivalent to £100. The rule that allows only judgments in terms of the local currency would be safeguarded thereby. The formula suggested is that in use by the French courts.[43] It is, however, probably in conflict with the traditional prejudice of the common law in favor of definiteness of judgments.[44] It also raises a technical difficulty inasmuch as the task of converting one currency into another cannot properly be left to the sheriff (or marshal).[45] In this connection it is remarkable that in a declaratory judgment the day-of-payment rule was used by an English court.[46]

Although these impediments are not insuperable, the traditional rule may be taken as practically unshakable. Assuming that to be true, at least the judgment-day rule should be substituted for the breach-day rule in the event that the local currency has depreciated after the day of breach. Probably the expansion of the breach-day rule after World War I is partly due to the fact that the pound and the dollar had been stable for so long. In any event, it is unjustifiable to impose upon the creditor a loss through depreciation caused by the debtor's default. It is true that the time when judgment is rendered depends partly upon the promptness of the creditor in pursuing his right and on the vicissitudes of judicial procedure,[47] but this shortcoming of the judgment-day rule carries little weight in the face of the gross injustice done by the breach-day rule. Location of the place of pay-

43. *Infra*, p. 374.

44. See *Black on Judgments*, I (2d ed., 1902), sec. 118.

45. That the ordinary writ of execution would not be appropriate to the situation was pointed out by Lindley, M.R., in *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581, 587 (C. A.).

46. *Kornatzki* v. *Oppenheimer*, [1937] 4 All.E.R. 133, 140 (Ch.D.). The American Private Bill, cited *supra*, n. 12, is likewise in point.

47. This is the common objection to the judgment-day rule. See, e.g., Sutherland, J., dissenting in the *Deutsche Bank* case (*supra*, n. 31) at 523 of 272 U.S., at page 168 of 47 S.Ct.; *Page* v. *Levenson*, 281 F. 555, at 559 (D.Md.1922); *Macfie's Judicial Factor* v. *Macfie*, 1932 Sc. L.T.Rep. 460. Concerning Mr. Justice Sutherland's opinion, see also *infra*, n. 57.

ment should be definitely deemed irrelevant.[48] There appears to be no reason why one who has promised to pay £1000 should be bound to pay a wholly different amount according to whether London or New York is the place of payment, the only difference, that of the cost of forwarding, being immaterial.[49] Mr. Justice Holmes advanced the theory that the amount of foreign currency, if payable in the United States, is *ipso facto* transformed into a dollar amount, but that view is untenable. According to it an English contract for payment of pounds sterling in New York automatically turns into a dollar contract if payment is not made in time; even the English courts would have to accept this consequence which according to Mr. Justice Holmes "flows from fundamental theory."[50] Still, there is no such theory except that the intent of the parties should govern the choice of the money of contract. The conversion rule is wholly procedural; once it is admitted the search should be for the conversion day coming nearest to the effect envisaged by the parties.

From a strictly scientific point of view, however, the first question should be for the law applicable to the foreign currency debt.[51] In case the debt is governed by foreign law, damages or revaluation as well as interest are to be granted in accordance with that law; the total thus ascertained being convertible into local currency at the rate obtaining on the day of payment, or if this is not permitted, at the rate on the day of judgment. Where the debt is governed by the law of the forum, restriction of damages to interest should not apply.[52]

48. *Supra*, p. 148.

49. Said Lord Eldon, in *Cash* v. *Kennion*, 11 Ves. Jun. 314, 32 Eng. Rep. 1109 (1805): "I cannot bring myself to doubt, that, where a man agrees to pay 100*l.* in London upon the first of January, he ought to pay that sum there upon that day. If he fails in that contract, whereever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed." This language has been relied upon to solve the conversion problem, *e.g.*, by Lindley, M.R., in *Manners* v. *Pearson*, [1898] 1 Ch. 581 at 588, and Sutherland, J., in the *Deutsche Bank* case (*supra*, n. 31) at page 522 of 272 U.S., at page 167 of 47 S.Ct. Lord Eldon's utterance, however, refers it seems merely to the debtor's duty to bear the costs of forwarding the money to the creditor, *supra*, p. 146.

50. 272 U.S. 520, 47 S.Ct. 167.

51. This was done in *Deutsche Bank* v. *Humphrey*, 272 U.S. 517, 47 S. Ct. 166, 71 L.Ed. 383 (1926), in order to justify the choice of the judgment day, and in *Zimmermann* v. *Sutherland*, 274 U.S. 253, 47 S. Ct. 625, 71 L.Ed. 1034 (1926), where the deposit of the sum owed in court was recognized as a discharge of the debt under Austrian law. In virtually every case, however, the matter of damages was disposed of by the English and American courts by the use of their own conversion rule.

52. *Supra*, p. 159.

These may be somewhat academic reflections. The common law rule which virtually disregards the foreign law with respect to interest, damages and revaluation, has at least the merit of simplicity where perfect justice can hardly be obtained. By a shift from the breach-day to the judgment-day rate where the local currency has depreciated, the rule would become more acceptable from the financial angle. What will probably happen, however, is just the opposite, namely, the general acceptance of the breach-day rule after the English model. The distinction made by Mr. Justice Holmes in the *Deutsche Bank* case has met with little acclaim [53] and is at odds with New York law.[54] Under *Erie R. Co.* v. *Tompkins* [55] the Federal court has to apply the substantive law of the State in which the court is sitting, a principle extended to such Federal rules of procedure which bear upon State-created rights "vitally and not merely formally and negligibly." [56] In the spirit of this holding the *Deutsche Bank* case may very well be over-ruled if occasion arises. One thing is sure, one should either have an overall breach-day or an overall judgment-day rule.[57] And if courts persist in the former view, the *Vionnet* case might find followers in the United States.

Agreements regarding the day of conversion or of the applicable rate are valid.[58] In this respect there is no difference between civil and common law. Such arrangements are frequent in international insurance.[59]

53. Four justices dissented. The *Vionnet* case, *supra*, n. 28, expresses accord with their dissent. See also Cook, "Federal courts and the Conflict of Laws," 36 Ill.L.Rev. 493, 502 (1942).

54. *Supra*, n. 29.

55. 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 (1938).

56. *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1946). Significantly, App. Hamburg, a court generally conversant with English law, in its judgment of May 15, 1929, *Hanseatische Rechts-und Gerichtszeitschrift* 1929 B no. 227, considered the conversion rule as part of English substantive law. Certainly, it is not far from being substantive.

57. A point made already by Mr. Justice Sutherland, dissenting in the *Deutsche Bank* case at 525.

58. This has never been doubted. See the cases *infra*, p. 382 ("money as measure") and the cases concerned with "multiple collection" clauses, *infra*, p. 903 . A tacit ratio agreement was assumed and held valid by Belgian Cass. May 24, 1925, Piret, *Les Variations Monétaires et leurs Répercussions in Droit Privé Belge* (1935) 83. The Peace Treaty of Versailles, Art. 296 (d), par. 3, gives private rate agreements precedence over treaty rates. The Geneva Law on Bills of Exchange, *supra*, p. 361, n. 5, offers another instance.

59. Inevitably there will be doubts and disputes on their interpretation. See *Pape* v. *Home Ins. Co.*, 139 F.2d 231 (C.C.A.2d, 1943) [fire

IV. Enforcement of Foreign Currency Debts in Civil Law—Set-Off [60]

Judgments in terms of a foreign currency have been held lawful in German,[61] Austrian,[62] Italian,[63] and other[64] civil law courts. French courts, though allowing the plaintiff to bring his suit for a sum in foreign currency, generally articulate the adjudication in terms of francs equivalent, at the time of payment, to the sum contracted for[65] with practically similar results as those

insurance covering goods abroad; conversion of the "market value" in Spanish pesetas into dollars according to the rate of the day of loss]; *Versicherungs-und Transport A. G. Daugava* v. *Henderson*, 49 Lloyds L.R. 252 (C.A.1934) [reinsurance in case of loss through fire; day of settlement between insured and ceding insurer rather than day of fire]. Currency problems of marine insurance connected with general averages are thoroughly investigated on a comparative basis by De Smet, *Assurances Maritimes* (1934), no. 524 bis; cf. also Piret, *supra*, at p. 73, and the questions discussed *infra*, p. 411, n. 35.

60. The subject has been comprehensively discussed by Neumeyer, (supra, p. 340, n. 1,) at 185.

61. *Reichsgericht*, Dec. 16, 1922, *R.G.Z.* 106, 74; Bavarian Supreme Court, Sept. 25, 1922, *Leipziger Zeitschrift*, 1922, 654; App. Berlin, *(Kammergericht)* March 10, 1923, *J.W.* 1924, 411.

62. Supreme Court of Austria, June 15, 1921, *Rechtsprechung* IV (1921) 67.

63. App. Genoa, Nov. 30, 1923, *Monitore dei Tribunali*, 1924, 454.

64. The Swiss Law on Enforcement of Debts *(Schuldbetreibungsgesetz)* of April 11, 1889, § 67(3) provides that, for purposes of execution, foreign currency must be converted into Swiss money. This presupposes judgments couched in terms of foreign currency. Hence conversion is limited to the purposes of execution; it does not deprive the debtor of his privilege to make payment in foreign currency. Swiss Federal Tribunal, Dec. 1, 1920, *Amtliche Sammlung* 46 III 403; June 27, 1946, *ibid.* 72 III 100. See also Trib. Vaud, Aug. 23, 1938, *Schweizerische Juristen-Zeitung* XXXVI (1939), 102.

Judgments in terms of foreign currency are also permitted in Norway: International Law Association, *Report of the 34th Conference* (1926), 559; Poland: *ibid.* at 573; in Sweden: Kôersner, "Etude de la question des changes," *Mémoire Presenté à la Conférence de l'International Law Association* (1926) 18, 26, the same view was followed by the Egyptian Mixed Courts, App. Alexandria, June 7, 1934, *J.D.Int.* 1934, 1007.

65. *Cass.*, Dec. 5, 1927, *J.D.Int.* 1928, 660; March 19, 1930, *ibid.* 1931, 1082; App. Paris, June 16, 1933, *ibid.* 1934, 938; App. Chambéry, Nov. 21, 1894, *Revue Générale du Droit International Public* 1895, 244. App. Paris, Nov. 20, 1938, *Nouvelle Revue de Droit International Privé*, 1939, 195, 203, considering the delay of the debtor, ordered conversion as of the day of payment, but not below the rate of the date of maturity—a commendable formula. *Cass.*, March 21, 1933, *ibid.* 1934, 373, held good even a judgment requiring a Swiss defendant to make payment in Swiss francs. See also *Cass.*, April 23, 1928, *D.H.* 1928, 302.

reached by the other civil law courts.[66] In Germany some doubts sprung up as to the proper procedure in the execution of the judgment; [67] but no serious difficulties appear to have arisen, either in Germany or elsewhere, in the enforcement of judgments, directly or indirectly requiring conversion as of the day of payment. In case of bankruptcy, conversion into the local currency is a matter of course, since the realization of the estate and the distribution of the proceeds to the creditors can only be carried out on that basis; the day of adjudication is the day of conversion.[68] The whole problem is losing importance through the expansion of exchange control which is apt to bar suits calling for payment in foreign currency.[69]

A set-off between debts involving different monetary units is generally not permissible under civil law because the homogeneousness of the two debts is a prerequisite of the right of set-off.[70]

For a survey cf. Domke, "Quelques questions de la pratique du droit privé monétaire," *Etudes Pratiques de Droit Commercial*, IV (1938), 298; notes to *Trib. civ.* Seine, March 14, 1939, *Gazette du Palais*, June 17, 1939, p. 9, and Erlanger in *Nouvelle Revue de Droit International Privé*, 1938, 179. The two notes, listing a great number of cases show that French jurisprudence is in flux. Not infrequently conversion was made at the rate of a date different from that of payment.

66. The creditor is entitled to payment in francs if the foreign-currency debt is payable in France especially between French parties. *Cass.*, Feb. 17, 1937, *J.D.Int.* 1937, 766. The court's language is rather broad and somewhat ambiguous.

67. The cases cited in n. 61 hold the general rules on compulsory enforcement of money judgments directly applicable to judgments framed in non-German money. This ended a doctrinal controversy. See Neumeyer, *supra* p. 340, n. 1 at 187.

68. *Cass.*, Nov. 17, 1930, *J.D.Int.* 1931, 1043; App. Paris, Feb. 7, 1925, *J.D.Int.* 1926, 391; App. Genoa, June 12, 1928, *Foro Italiano* 1928 I 1054; App. Ghent, May 16, 1929, *Pasicrisie Belge* 1930 II 26. For further references, see Travers, *Le Droit Commercial International* VII, 1 (1935), n. 11361-11367, and Jaeger, *Konkursordnung* II (6th and 7th ed., 1936) 244 note 8.

69. *Infra*, sec. 31. The creditor will ordinarily be content with a judgment in the local currency. Austrian Supreme Court, Feb. 1, 1933, *Die Rechtsprechung*, 1933, 28, is illustrative.

70. Austrian Supreme Court May 2, 1923, *Rechtsprechung* V (1923) 319; Sept. 9, 1924, *ibid.* VI 220; July 30, 1924, *Die Rechtsprechung* 1925, 8 (*contra:* Feb. 6, 1934, *ibid.* 1934, 144); App. Hamburg, July 7, 1924, *Hanseatische Gerichtszeitung* 1924, 198; same court, Oct. 22, 1937, *Hanseatische Rechts-und Gerichtszeitschrift* 1937 B 452; Supreme Court of Luxemburg, March 2, 1923, *Pasicrisie Luxembourgeoise* XI 136, extensively quoted in Travers, *supra*, n. 68, at VII(1) n. 11367. See also *Thornton* v. *Nat. City Bank of New York*, 45 F.2d 127 (C.C.A.2d, 1930). *Contra:* Swiss Federal Tribunal, Oct. 26, 1937, *Amtliche Sammlung* 63 II 383; App. Ghent, May 16, 1929, *Pasicrisie Belge* 1930 II 26. In the Hamburg

However, in case the debtor owing foreign currency has the power to make payment in local currency, he may set off his indebtedness against a claim for payment in local currency held by him against his creditor.[71]

Section 26

DETERMINATION OF THE MONEY OF CONTRACT

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I. Ambiguous Currency Names

The resolution of doubts concerning the "money of contract" became important after World War I when the currencies of the various countries entered their fateful path of shock and breakdown.[1] In international relations creditors who had contracted in terms of francs, dollars, pounds, etc., showed an understandable inclination to have these terms interpreted as Swiss francs, American dollars, pounds sterling, etc., very much to the dismay of their debtors.

In such controversies[2] it has ordinarily been held that the ambiguous currency name is related to the agreed place of payment.[3] That view has sometimes been represented as an application of the rule that the "manner of payment" is determined

judgment of 1937 the defendant owed pounds, while the plaintiff owed marks. Set-off was refused on the ground that because of German exchange control, the plaintiff would not be able to convert marks into pounds.

71. *Reichsgericht*, Dec. 20, 1922, *R.G. Z.* 106, 99; Austrian Supreme Court, May 2, 1923, *Rechtsprechung* V (1923) 319; App. Hamburg, in preceding note. Moreover, a set-off between currencies of different denomination may be accomplished by agreement, the rate of exchange being the measure; App. Milan, Dec. 29, 1925, *Monitore dei Tribunali* 1926, 174. See also Neumeyer, *supra*, p. 340, n. 1, at 137.

In Anglo-American law set-off is ordinarily effected by the court. In this respect the rule on compulsory conversion greatly simplifies the situation but there seem to be no rulings thereon.

1. There are some earlier cases: *Dorrance* v. *Stewart*, 1 Yeates (Pa.) 349 (1794) [Pennsylvania or Connecticut pounds?]; *Quimby* v. *The Euphemia*, Fed.Cas.No.11,512 (D.C. about 1843) [seaman's wages in sterling or in Newfoundland pounds?]. Both cases are to be explained on their own facts.

2. We are here not concerned with errors resulting from the similarity of the old and the new currency names where governments had reconstructed their monetary systems. *Supra*, p. 198.

3. This view is set out with particular clarity in the German Commercial Code 361: "In case of doubt,

by the law of the place of payment. But the determination of the money of contract involves the substance of the debt rather than the manner of payment. Nevertheless in this particular case the emphasis upon the place of payment has much to recommend it. As a matter of fact, if not of law, it is reasonable to interpret an ambiguous currency stipulation in terms of the currency of the place of payment, because if one promises to pay dollars in New York, one naturally thinks of United States currency, even though the contract was perhaps made in, and had other important contacts with Canada.[4]

measure, weight, currency, time computation, and distance denominations as customary at the place of payment must be considered as contracted for". Similarly Austrian Civil Code 905 par. 1(2) and Commercial Code 338; Brazilian Civil Code 947. See further *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122 (H. of L. 1933) at 156; *Trecartin* v. *The Rochambeau*, Fed.Cas.14,163 (C.C.D.Maine, 1865); *Benners* v. *Clemens*, 58 Pa. 24 (1868); *In re Tillam, Boehme and Tickle Pty., Ltd.*, [1932] Vict.L.R. 146 (Sup.Ct. of Victoria, 1931); *Joffe* v. *African Life Assurance Society*, [1933] So. Afr.L.Rep., Transv.Prov.Div. 189 (Sup.Ct. of So.Africa, 1932); *Mundell* v. *Radcliffe*, [1933] High Court of Southern Rhodesia Rep. 59 (1933); *Aktiebolaget Tratalja* v. *Evelyn Haddon & Co., Ltd.*, [1933] So.Afr.L.Rep. Cape Prov.Div. 156 (Sup.Ct. of So. Africa, 1932); *Myers* v. *Union Natural Gas Co.*, 53 Ont.L. R. 88 (Sup.Ct. of Ontario 1922); *Simms* v. *Cherenkoff*, 62 D.L.R. 703 (Sask.K.B. 1921); *Johnson* v. *Pratt*, [1934] 2 D.L.R. 802 (Manitoba K.B.) [dollar contract interpreted by the court to mean United States dollars as to capital, Canadian dollars as to interest]; *Cass.*, Nov. 18, 1895, *J.D.Int.* 1896, 381; App.Paris, Jan. 29, 1923, *D.P.* 1923 II 129; March 6, 1923, *J.D.Int.* 1924, 683; Belgian cases cited by Piret, *supra*, p. 373, n. 58, at 79; and the references given infra, n. 8 and 9.

A different rule has been adopted by the English Coinage Act, 1870, 33 Vict., c. 10, § 6, which provides "that . . . every transaction . . . relating to money . . . shall be made . . . according to English coin unless the transaction is made . . . according to the currency of some British possession or some foreign state." Lord Tomlin, in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122 at 144 (H. of L., 1933) remarked: "I confess that I find difficulty in assigning any meaning of precision to this obscure section." However the rule seems to mean that agreements regarding currency should be construed, in case of doubt, as contemplating English currency. Such a construction is rendered more probable by The Irish Currency Assimilation Act, 6 Geo. IV, c. 79 (1825). This statute on which the 1870 provision was obviously modeled, established under certain conditions, a presumption in favor of the English currency. Little merit can be attributed to the theory used in *Corporation des Obligations Municipales limitée* v. *Ville de Montréal Nord*, 59 Rapports Judiciaires Québec, Cour Sup., 550 (Superior Ct., 1921), according to which the monetary unit [dollar] of the law applicable [American law] is the money of contract.

4. Confusion of money of contract and money of payment appears particularly in *Adelaide Electric Sup-*

The rule under discussion assumes a special significance in the case of bills of exchange as they ordinarily provide for a particular place of payment.[5] It has also been held that a Frenchman who had an overdrawn "francs" account with a Swiss bank owed Swiss francs, since the balance was payable at the bank's domicile.[6] Similarly Swiss insurance companies have ordinarily been required to pay Swiss francs on insurance policies, payable in Switzerland in "francs".[7] While these instances can be multiplied,[8] the place of payment theory should not be applied[9] in a

ply Co. v. *Prudential Assurance Co.*, [1934] A.C. 122 (H. of L., 1933) holding that pounds payable as dividends in Australia, meant Australian pounds. Said Lord Warrington of Clyffe, "Monetary obligations are effectually discharged by payment of that which is legal tender in the *locus solutionis*" (at 138). In fact the Court was concerned with the money *contracted for*. The medium of discharge was irrelevant. Even more doubtful is Lord Wright's statement (at 151) that an essential element in the law of the foreign place of payment is the law of currency or legal tender in that place. The question was of the *currency*, and not of the *law* of the place of payment, and this currency is by no means an "essential element" of that law. Contracts in a foreign currency occur everywhere. The inexact language of the Court has infected other decisions, see the *British and French Trust* case, *supra*, p. 292, n. 53.

5. The Geneva Uniform Law on Bills of Exchange and Promissory Notes, 1931, Art. 41, par. 4, provides: "If the amount of the bill of exchange is specified in a currency having the same denomination, but a different value in the country of issue than the country of payment, reference is deemed to be made to the currency of the place of payment." Same: Geneva Uniform Law of Cheques, Art. 36, par. 4.

6. *Cass.*, March 1, 1926, *J.D.Int.* 1926, 661, see also judgment of April 15, 1926, *ibid.*, 1926, 970; but the sounder view prevailing in these cases was abandoned in the decision of August 2, 1926, *J.D.Int.* 1927, 103. In *Sheppard* v. *First International Bank of Sweet Grass*, [1924] 1 D.L.R. 582 (Alberta Sup.Ct., Appellate Div., 1924), the defendant, a Montana frontier bank, conducted accounts in either United States or in Canadian dollars. Held that a Canadian farmer had to be contented with payment of Canadian dollars, since there was no agreement to the contrary.

7. See infra, p. 401, n. 65.

8. See *Simms* v. *Cherenkoff*, 62 D.L.R. 703, (Sask. K.B., 1921); *Joffe* v. *African Life Assurance Soc. Ltd.*, [1933] S.Afr.L.R., Transv.Prov.Div. 189 (Sup.Ct. of S.Africa, 1932). In the latter case the defendant company was held to owe South-African pounds, Capetown being the place of payment, although the policy was governed by the law of South-Rhodesia the pound of which had depreciated.

9. As has sometimes been done by German, Austrian and Swiss courts. *Reichsgericht*, Sept. 29, 1919, *R.G.Z.* 96, 270 at 272; Supreme Court of Austria, July 13, 1921, *Rechtsprechung* IV (1921) 69 and Jan. 11, 1922, *ibid.* 170; Swiss Federal Tribunal May 29, 1923, *Praxis des Bundesgerichts* XII 233 and Feb. 14, 1924, *Amtliche Sammlung* 50 II 27.

rigid way. The conduct of the parties after the conclusion of the contract will frequently furnish the most valuable clues as to the money contracted for.[10] In insurance cases especially, courts of various countries have properly emphasized the currency in which premiums were paid when a discount developed between the two synonymous currencies.[11] Again, in the case of long-term mortgage investments attention should be paid to the currency used in the territory of the mortgaged real estate rather than to the currency used at the place of payment.[12] Other considerations varying with circumstances may prevail in adjudicat-

10. Examples are furnished by *New York & Pennsylvania Co.* v. *Davis*, 9 F.2d 911 (C.C.A.3d, 1925), *cert. den.* 271 U.S. 673, 46 S.Ct. 488, 70 L.Ed. 1144 (1926); *Ottoman Bank of Nicosia* v. *Dascalopoulos*, [1934] A.C. 354 (Privy Council, 1934); *Ehmka* v. *Border Cities Improvement Co.*, 52 Ont.L.R. 193 (Sup.Ct. of Ont., 1922); Swiss Federal Tribunal, Nov. 6, 1923, *Amtliche Sammlung* 49 II 397; App. Hamburg, June 18, 1924, *Hanseatische Gerichtszeitung* 1924, 229.

In *Myers* v. *Union Natural Gas Co.*, 53 Ont.L.R. 88 (Sup.Ct. of Ont., 1922), conclusiveness of certain conduct of the parties in giving and receiving American dollars in payment, was denied for special and plausible reasons; similarly *Ottoman Bank* v. *Chakarian*, [1930] A.C. 277 (Pr.C., 1930), and Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.*, 1929, 497, 502 in case of the *Crédit Franco-Canadien*. See also *Re Taltal Nitrate Co., Ltd.*, 73 L.T.R. 422 (Ch. 1895). On Argentine gold clauses, *supra*, p. 247, n. 37.

11. *Weiss* v. *State Life Ins. Co.*, [1934] 4 D.L.R. 469 (Ontario Court of Appeal, 1934) [Indianapolis, domicile of the defendant and place of payment; actual payments in Canadian dollars; the latter the money of contract]; *Cass.*, June 13, 1928, *J.D.Int.* 1929, 112; Nov. 28, 1932, *ibid.*, 1934, 134; Trib. civ. Seine, April 8, 1922, *ibid.*, 1922, 658; Trib. civ. Lyon, Feb. 9, 1924, *ibid.*, 1925, 741; Swiss Federal Tribunal, March 1, 1923, *Praxis des Bundesgerichts* XII 175 [fire insurance]; Supreme Court of Czechoslovakia, May 12, 1937, *Prager Juristische Zeitschrift*, 1937, 590; Mixed App. Alexandria, Jan. 25, 1923, *J.D.Int.* 1924, 774, and March 30, 1927, *Revue du Droit Bancaire* 1928, 351; Nov. 12, 1924, *J.D.Int.* 1926, 206; Nov. 26, 1924, *ibid.* 1926, 207; March 10, 1926, *Revue du Droit Bancaire* 1927, 368. The first and second Alexandria cases awarded Egyptian (gold) francs, the rest French francs. The different results were the consequences of variances in the subsequent conduct of the parties.

12. The courts are not in accord with this view. *Johnson* v. *Pratt*, [1934] 2 D.L.R. 802 (Manitoba K. B., 1934); *Supreme Court of Czechoslovakia*, May 18, 1920, *Rechtsprechung* IV (1921) 29 and Aug. 31, 1920, *ibid.*, V (1923) 206, both cases referring to litigation originating in the dismemberment of the Austrian monarchy. *Supra*, p. 133.

But see *Connor* v. *Earl of Bellamont*, 2 Atk. 382, 26 Eng.Rep. 631 (Ch. 1742) [loan contracted in England, Irish mortgage, Irish interest rate allowed. The case has also been cited for its alleged interpretation of a "pound" stipulation in terms of Irish currency] and *McClelland* v. *Trustees, Executors and Agency Co., Ltd.*, 55 C.L.R. 483 (High

ing cases of ambiguous currency denominations.[13] Thus, the addition of the word "sterling" to "pound" makes it clear that the English pound is referred to.[14] In the interpretation of wills

Court of Australia, 1936), a moratorium case placing the whole emphasis on the *lex rei sitae* of the mortgage. Depending on the circumstances, the emphasis on the mortgaged land may be inappropriate. See the case of the *Société des Hotels Splendide, etc. d'Aix les Bains*, *infra*, p. 400.

13. In *Washburn Crosby Co.* v. *Northern Pac. R. Co.*, 16 F.2d 76 (C.C.A.8th, 1926), Stone, C.J., gives an able analysis, with an eye to the currency problem of the semi-official United States-Canada railroad agreement on freight charges in through traffic. In *Liebeskind* v. *Mexican Light & Power Co.*, 116 F. 2d 971 (C.C.A.2nd, 1941), important references in the bond to Canada were decisive in holding that Canadian dollars were meant. "Marks" promised in World War I by the German occupation authorities during the occupation of Poland were declared to mean Polish rather than (worthless) German marks. Germano-Polish Mixed Arbitral Tribunal in *Gwirzman* v. *German State, Recueil des Décisions des Tribunaux Arbitratux Mixtes* VII (1927) 732, 737.

A general rule may be stated to the effect that commissions and similar participations ordinarily run in the same monetary terms as does the principal transaction. *Reichswirtschaftsgericht* (German), Sept. 9, 1921, *J.W.* 1922, 744. But in *King Line, Ltd.* v. *Westralian Farmers, Ltd.*, 43 Lloyds L.R. 378 (1932), the House of Lords interpreted a commission promised by the English line (plaintiff) to the defendant on the total freight as an Australian-pound commission although the freight charges were paid in sterling. The awkward language of the charter party was responsible for this outcome. See the dissenting opinion of Lord Scrutton, disagreeing with his brethren of the Court of Appeal (reversed by the House of Lords), 48 T.L.R. 158 (1931). There may be mentioned a holding of the English Court of Appeal in *Bain* v. *Field & Co.*, 5 Lloyds L.R. 16 (1920). The Court ruled that when a seller quotes a price in an ambiguous currency (dollars) he is supposed to mean the currency of his own country (Canadian dollars in that particular case).

14. *De Bueger* v. *Ballantine & Co.*, [1938] A.C. 452 (Pr. C.); a New Zealand case. See also *Lansdowne* v. *Lansdowne*, 2 Bligh 60, 4 Eng. Rep. 250 (H. of L., 1820), and *Auckland Corp.* v. *Alliance Insurance Co.*, [1937] A.C. 587 at 603 (Pr. C.) ["*sterling that is English currency*"]. With regard to an entirely South African contract the word "sterling" was deemed meaningless. *Fisher, Simmons & Rodney (Pty.) Ltd.* v. *Munesari*, 53 Natal L.R. 77 (Sup. Ct. of S. Afr., 1932). This is unconvincing.

However, in Irish instruments of the eighteenth and the early nineteenth centuries the phrase "sterling, current and lawful money of Great Britain" did frequently mean Irish currency. The leading case is *Neville* v. *Ponsonby*, 1 Ir. Law Rep. 204 (Exchequer Ireland, 1839). Same as to bills of exchange made abroad *Pickardo* v. *Machado*, 4 B. & C. 886, 107 Eng. Rep. 1288 (K.B., 1825). Contrariwise, in *Cope* v. *Cope*, 15 Sim. 118, 60 Eng. Rep. 562 (Vice Chancellor, 1846), the Court awarded English pounds on a marriage settlement couched in terms of "1,000 sterling lawful money of

and settlements, the emphasis has always been on the domicile of the testator or promisor rather than on the place of payment.[15]

Sometimes the money of contract is uncertain although no ambiguous currency term is employed by the parties. Thus, before World War I, German parties had bought and sold securities in the London and New York stock markets on a large scale through German brokers. After the war considerable litigation arose because of doubt as to whether the accounts of the customers were to be settled on a sterling or dollar or mark basis. A sound solution of the controversies would have relied primarily on the currency used by the broker in conducting the customer's account, provided the course of accounting were accepted or acquiesced in by the customer. But this suggestive point of view was overlooked by the *Reichsgericht* which thus arrived at unsatisfactory decisions.[16] Another problem was raised by German life insurance companies which before the war had sold policies running in Swiss and other non-German currencies but had invested their insurance reserves, in accordance with German law, in German securities and mortgages. After the breakdown of the mark, the companies attempted to have the policies treated as mark contracts because of the alleged tie-up of the insured amounts with the reserve funds. But the contention of the companies was firmly refuted by the *Reichsgericht* which, despite the difficult situation of the companies, held them liable to make payment in the foreign currency.[17]

The American reports offer only a few comparable cases. In a somewhat puzzling Pennsylvania case of 1868, a purchase price

Ireland". These peculiarities of Irish draftsmanship or interpretation cannot be generalized. *Bushby* v. *Camac*, Fed. Cas. 2,226 (C.C. E.D. Pa., 1822), is a pertinent American case. On no account is the expression "sterling" indicative of a gold clause. *Supra*, p. 238, n. 6.

15. *Wallis* v. *Brightwell*, 2 P. Wms. 88, 24 Eng. Rep. 652 (Ch., 1722); *Saunders* v. *Drake*, 2 Atk. 465, 26 Eng. Rep. 681 (Ch., 1742) [Jamaica pounds]; *Pierson* v. *Garnet*, 2 Bro. C.C. 38, 29 Eng. Rep. 20 (Ch., 1786); *Holmes* v. *Holmes*, 1 Russ. & M. 660, 39 Eng. Rep. 253 (Master of the Rolls, 1830); *Macrae* v. *Goodman*, 5 Moore 315, 13 Eng. Rep. 512 (Pr. C., 1846) [Dutch or Colonial Dutch currency]. See also *supra*, p. 187, n. 70.

16. The main cases are *Reichsgericht*, Dec. 15, 1920, *R.G.Z.* 101, 122; March 25, 1922, *ibid.* 104, 223; July 11, 1923, *ibid.* 108, 191. They were commented on by the present writer in *J.W.* 1921, 891; *ibid.*, 1922, 1721; *ibid.*, 1924, 181. See also *infra*, p. 407.

17. *Reichsgericht*, July 6, 1923, *R.G.Z.* 107, 111; March 25, 1924, *J.W.* 1924, 1364; June 17, 1924, *ibid.* 1924, 1366. For a comprehensive study of the problem, see Wahle, *Der Einfluss diktierter Kurse auf Laufende Lebensversicherungsverträge* (Vienna, 1932).

explicitly stated in dollars and found by the court to be payable in London, was deemed to be a sterling price, regardless of the language of the contract and of the common conduct of the parties.[18] The decision amounted virtually to a revaluation on a gold (sterling) basis, not authorized by law. Unusual is also a recent case from the State of Washington, which dealt with an American contract written in Italian and referring to "scudi." The "scudi" the Court held, meant dollars.[19]

II. Money of Measure

A phenomenon which often obscures monetary agreements is the contractual reference to a sum which does not fix the amount of the debt, but merely serves as a calculating factor or "measure" [20] in its determination. There is a wide variety of such clauses. In the majority of instances the debtor promises a seemingly definite amount of his national money. For instance, a German debtor promised to pay 1,000 marks on the basis of \$1 = 4.20 marks [21] or an Italian debtor promised to pay 1,000 lire on the basis of £1 = 92 lire.[22] In such situations we are confronted with mark debts or lire debts, respectively, the amount of which is in fact uncertain, being dependent upon the rate of exchange of another currency which is presumably considered more stable by the parties. Such clauses practically guaranteeing a definite rate of exchange *(clauses de garantie de change)*[23] do

18. *Benners* v. *Clemens*, 58 Pa. 24 (1868).

19. *Lucci* v. *Lucci*, 2 Wash.2d 624, 99 P.2d 393 (1940).

20. The question whether a monetary name (franc, dollar, etc.) implies a tacit gold clause is discussed *supra*, p. 240 *et seq.*

21. This ratio was frequently used in Germany during and after the great inflation 1918–1923 (The exact pre-war ratio was 4.197). See, e. g., *Reichsgericht*, Dec. 14, 1934, *R.G.Z.* 146, 1.

22. See Ital. Cass., Jan. 10, 1936, *R.D.Comm.* 1936 II 386; App. Milan, Nov. 26, 1937, *Foro Italiano* 1938 I 273. In the first case the guaranty was qualified by a "tolerance" clause, *supra*, p. 258. Another example is furnished by the English Government's purchase of rice from Indian exporters during World War I. The sellers were promised payment in pounds, but on a definite ratio to the rupee, "fluctuations being on buyer's account." *Royal Commission* v. *Bulloch Bros.*, 13 Lloyds L.R. 418 (C.A. 1922). In the period preceding World War II Soviet authorities stipulated with German employees for ruble wages on a dollar basis. *Reichsarbeitsgericht*, (German Supreme Labor Court), Dec. 10, 1932, *Zeitschrift für Ostrecht* 1933, 529.

23. In the case of *Travellers Bank* v. *Patenôtre*, in 1932, the latter was given a guaranty by the American Bank (probably through its French branch) securing him an equivalent of 25.325 francs for each dollar in certain periodical dollar payments due to Mr. Patenôtre. The fact situation was peculiar in that

not imply a tacit gold clause.[24] Under French law the clauses are void except if embodied in "international" contracts[25] and even in that area their effect has been reduced by restrictive interpretation.[26]

In another set of cases the obligor promises an amount of foreign currency measured at a fixed ratio to his national money. Thus the Canadian Alberta and Great Waterways Railroad Co. floated a bond loan in London, the coupons of which contained the following stipulation: "The company will pay to bearer $——— of lawful money of Canada at the fixed rate of exchange of 4.86⅔ for the pound sterling . . . in London, England, being half yearly interest at the rate of 5% *per annum.*" (The particular bond was for 1,000 Canadian dollars.) Contrary to what appeared on its face, this was a sterling coupon rather than a dollar coupon and was so held by the Alberta Supreme Court, Appellate Division,[27] which dismissed the claim of a holder for 25 Canadian dollars, then at a premium over sterling money. The "foreign-currency" character of the debt, indicated by the English place of payment, was "disguised" in this case, the dollar serving merely as "money of measure".[28] In like cases, there is

the guaranty was not undertaken by the debtor, but by a third person. App. Paris, Oct. 26, 1933, *J.D. Int.*, 1933, 943. See *infra*, p. 431, n. 72.

24. *Supra*, p. 240.

25. *Supra*, p. 267.

26. App. Douai, Oct. 21, 1924, *Gazette du Palais*, 1924 II 600, held the guaranty good only in respect to unimportant *sic* fluctuations of the market. The creditor was an English corporation which wanted to secure the equivalent of francs in terms of pound sterling.

27. *Brown* v. *Alberta and Great Waterways Railway Co.*, 59 D.L.R. 520 (1921).

28. A kindred case is *Pennsylvania Ry. Co.* v. *Cameron*, 280 Pa. 458, 124 A. 638 (1924), where an Australian bill of lading provided for a £ freight, payable in Philadelphia at the rate of $4.8666. This was a disguised dollar freight. *Booth and Co.* v. *Canadian Government Merchant Marine Ltd.*, 63 F.2d 240 (C.C.A.2d, 1933), though presenting some comparable features, concerned a sterling-dollar option, with the choice in the debtor, the freight being stipulated in sterling "or equivalent," namely (under the circumstances), dollars.

Disguised foreign currency debts have long been known. During the Revolutionary War interest on the French loan of the Confederation was paid in the following form:

> "Exchg. for 18 Dollars at five Livres Tournois per Dollar. Numb. 710
>
> United States of America 18th Day of March 1779.
>
> At Thirty Days sight of this Fourth Bill, First Second and Third not paid, pay to Benjamin Goodhue Jr. or Order Eighteen Dollars in Ninety Livres Tournois for Interest due on Money borrowed by the United States.

no "local-payment rule" in favor of the debtor, the national money being neither *in obligatione* nor *in solutione*.[29]

The situation becomes more involved where the foreign currency due is payable outside the national territory of that currency. Before World War I, a German mortgagor promised his mortgagee, a Swiss Bank, to pay back [in Germany] the 65,000 marks received "payment of interest and principal to be made at the fixed ratio of 123.50 Swiss francs for each 100 marks" [which was the pre-war rate of exchange].[30] This again amounts to a disguised foreign currency debt, marks being the "money of measure" and Swiss francs the "money of contract." Still a different feature is presented in that the German marks, because of the "local-payment" rule, were at the same time the "money of payment" to be calculated at the rate of exchange existing at the time of payment. (There are, then, three phases in the mental process: determination of the "money of measure"; of the "money of contract"; and of the "money of payment"). In another case a loan contract, on its face phrased in a definite sum of marks, between a Dutch creditor and a German debtor contained the following provision, ostensibly of an ancillary nature: "All payments are to be made in Dutch guilders at the rate of exchange existing at the time of the loan." [31] Here a disguised guilder debt, payable in Germany, was presented, further obscured by the substitution, for a numerically stated ratio, of the reference to the rate which existed at the time of contracting.

"Money of measure" was frequently used in international insurance during and shortly after World War I because the in-

To the Commissioner (or Commissioners of the United States of America at Paris

T (?) Hokinson
Treasurer of Loans"

These were in reality Livre notes. (Reprinted with the permission of the Chase National Bank, New York, owner and exhibitor of the note).

29. The ruling of *Société des Hotels Le Touquet* v. *Cummings*, [1922] 1 K.B. 451 (C.A., 1921), discussed *supra*, p. 369, n. 37, does not apply to the money of measure. *Ivar an Christensen* v. *Furness*, 12 Lloyds L.R. 288, 291 (K.B. 1922).

30. *Reichsgericht*, Nov. 29, 1920, *J.W.* 1921, 231. Another remarkable instance is the Danish Colonial Lottery of 1932, floated in France, the face amount of the tickets being expressed in French francs in the following manner: "All lots are payable in Danish crowns at the pre-war ratio of 100 francs = 72 crowns, regardless of the actual value of the franc." See Seignol, *L'Option de Change et l'Option de Place* (1935) 29. The "stabilized" franc and the reference to the pre-war ratio may have sounded delightful to the ears of the French public, but the pre-war ratio had an entirely different meaning in 1932, when the Danish crown, too, had depreciated.

31. *Reichsgericht*, June 27, 1923, *J. W.* 1924, 173.

sured often conducted his business under another currency than that of the insurer. Hence the insured interest was sometimes indicated in terms of the insured's currency, whereas the amount of insurance ran in terms of the insurer's currency.[32] For instance, an open policy sold by a German company to a Norwegian firm provided that the insurance for each shipment should not exceed 3,000,000 marks. When the insured had declared the value in Norwegian crowns and the goods were lost the company offered 3,000,000 depreciated marks. The *Reichsgericht,* however, held that the computation of the maximum amount to be paid was to be made by converting it into crowns at the rate of exchange prevailing at the beginning of each insurance period; the court rejected the defense of the insurers that they could not be expected to take over the currency risk, which is uncoverable by reassurance.[33] In that case no definite ratio between the two currencies involved was provided for by the contract. Such a ratio, however, was ordinarily incorporated into foreign war insurances by English companies.[34] They probably meant to stabilize their obligations, but were mistaken. In a French case an English reassurance company had sold to a French ceding insurer, a reassurance policy on £5,000 "at a ratio of 10,000 francs for £352" which was then probably in accord with existing exchange conditions. When the event insured against occurred, the insured was indemnified by the ceding insurer in francs which had depreciated meanwhile. When subsequently the franc recovered, the ceding insurer sued the English company in a French court for pounds at the agreed rate. The court held for the

32. See *Poulsen & Can* v. *Massey,* 1 Lloyds L.R. 497 (K.B. 1919); *McIntyre* v. *Krutwig,* 10 ibid. 430 (K.B. 1922); *Ivar an Christensen* v. *Furness,* 12 *ibid.* 288 (K.B. 1922). An early precursor is *Phillips* v. *Insurance Co. of Philadelphia,* Fed. Cas.No.11,102 (C.C.D. Pa., prior to 1822), involving dollar insurance with the rupee as money of measure. Identity of both contractual currency terms existed in the reassurance cases, *Versicherungs-und Transport A. G. Daugava* v. *Henderson,* 49 Lloyds L.R. 252 (C.A. 1934), and *Reichsgericht,* April 22, 1925, *J.W.* 1926, 1970. In the first case the point was merely application of the Anglo-American conversion rule, the *lats* (Latvian money) contracted for to be converted into pounds at the rate of the date when the ceding insurer paid the original insured. In the German case the ceding German insurer had paid Norwegian crowns, but was justly granted only depreciated marks, as contracted for. See also cases cited *infra,* n. 35–37 and sec. 27, ns. 2, 16.

33. Judgment of April 16, 1924, *R.G. Z.* 108, 153.

34. According to App. Paris, June 25, 1926, *Revue de Droit Maritime Comparé* XIV (1926) 432, this was true for the majority of English policies. The court calls the provisions fixing a franc-sterling ratio "exchange clauses."

plaintiff considering that his profit, in itself contrary to insurance principles, was the result of the fluctuations of the rate of exchange rather than the result of the insurance which had been definitely settled through the indemnification of the original insured.[35]

While in this situation sterling was owed by the English company, in the American case *Marine Insurance Co., Ltd.* v. *Craig McLanahan*,[36] a dollar debt of an English company was presented. An American had insured his barge with the latter under a policy with a dollar face amount and prescribing "all claims to be settled at $4.75 to the £". Premiums were paid in pounds according to this ratio. Upon total loss of the barge, the company offered payment of the face amount of the policy in depreciated pounds sterling, but was held liable to pay the face amount. The House of Lords, however, in a similar case dismissed the suit against the English company holding the ratio agreed upon not applicable to the face amount of the policy, which was expressed in pounds sterling.[37] The opinion is silent with regard to premiums. The presence of the rate agreement was explained by the Court merely on the ground that "there might be certain general average claims which were made in dollars and which from their nature might require to be translated into currency", but apart from the arbitrary nature of this reference it is not convincing that indemnification for total loss should be computable on a lower

35. *Cass.* April 23, 1928, *D.H.* 1928, 302. In a case where the ceding insurer had made an indemnification contract with the assuming reinsurer in terms of marks, but had contracted with the original insured in terms of a non-German currency the *Reichsgericht*, April 22, 1925, *J.W.* 1926, 1970, accurately held that reassurance is not supposed to cover the risk of fluctuating rates of exchange. No provision for a ratio between the two currencies involved existed in this case. For a discussion of currency problems of reassurance see Hagen, "Rückversicherung und Währungssturz", in *Festgabe für Alfred Manes* (1927) 204.

36. 290 F. 685 (C.C.A.4th, 1923).

37. *Howard Houlder and Partners* v. *Union Marine Insurance Co.*, 38 T. L.R. 515 (H. of L., 1922); affirming 37 T.L.R. 579 (C.A., 1921). No more convincing is *Larsen* v. *Anglo-American Oil Co.*, 20 Lloyds L.R. 67 (1924), where the House of Lords, reversing the Court of Appeal, held an English insurance policy sold to a Norwegian freighter in terms of Norwegian crowns, to be a £ policy primarily because the premiums were fixed in £. The crowns had appreciated considerably since the time of contracting. A French counterpart is App. Paris, April 15, 1926, *Revue de Droit Maritime Comparé* XIV (1926) 418, where a policy of a French company, phrased in terms of francs and dollars, was held a franc policy despite strong indications to the contrary. The annotator of the case, Mr. Morillot, justly characterizes the court's construction as "hazardous".

basis than indemnification for partial loss in the case of general averages.

Generally judicial pronouncements on this important matter have not been very edifying [38] except that the German courts showed a remarkably good record. To be sure, draftsmanship of the "money of measure" device is sometimes so poor as to make a congruent and at the same time sensible interpretation almost impossible,[39] but even so the English insurance cases are greatly disappointing.

Section 27

MULTIPLE OPTIONS

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I. Options de Change and Options de Place [1]

The high development of financial technique in international finance prior to 1931 is indicated, among others, by clauses facilitating the simultaneous floating of a bonded loan in several countries. Such loans often provided that the prospective buyer of a bond could receive interest and principal alternatively in one of several places (for instance, in New York, London or Paris), in the currency used there. The same device was employed in the foreign business of life insurance companies, especially for life

38. A Czechoslovakian seller and a Viennese buyer had contracted in terms of czechocrowns to be paid in Austrian crowns at a rate of 1:6½ "promptly without discount at the *Wiener Bankverein*" (a Viennese bank). Subsequent to the making of the contract the Austrian crown suffered further depreciation. The buyer, not having paid in time, was held liable by the Supreme Court of Czechoslovakia, June 5, 1923, *Auslandsrecht* IV (1924) 320, to pay the amount of czechocrowns which had actually been stipulated merely as a "money of measure." As a result, he lost the advantage of the 1:6½ ratio.

39. See *Royal Trust Co.* v. *Oak Bay*, [1934] 4 D.L.R. 697 (British Columbia Sup.Ct. 1934), *infra*, p. 393, n. 27; *Modiano Brothers & Son v. F. D. Bailey & Sons, Ltd.*, 47 Lloyds L.R. 134 (K.B., 1933), *supra*, p. 246, n. 35; *Royal Commission v. Bulloch Bros.*, 13 Lloyds L.R. 418 (C. A., 1922); App. Bordeaux, May 23, 1921, *D.P.* 1923 II 6.

1. See the writer's "Multiple currency and index clauses", 84 *U. of Pa. L.R.* 569 (1936); Seignol, *L'Option de Change et L'Option de Place* (1935) offering ample French material; Pictet, "L'Option de change", in *Zeitschrift für Schweizerisches Recht* LIV (1935) 310; Neumeyer, *Internationales Verwaltungsrecht* III part 2 III (1930) 176; Schoo, *La Clausula Oro* (1937) 384.

annuities [2] and in some other situations.[3] Numerous forms and shadings have been elaborated, the paramount distinction being the following: (I) Either one of the currencies alternatively promised is basic, with the result that one of the places mentioned in the bond [4] is basic also (namely the place where that currency is the common money), or (II) the various currencies and the places of payment are coordinated to each other. In the first case, the amount due is fixed exclusively in the basic currency and is payable within the territory of that currency, the equivalent of the basic amount being collectible in the other places mentioned in the bond, in the local currency at the current rate of exchange. In the second case, a definite amount is provided in terms of each currency involved, independent of the reciprocal fluctuations of the rate of exchange. The French contrast the two situations as *option de place* and *option de change*,[5] a nomenclature widely received also outside of France.[6] American legal practice has in the first place developed the contrast of "payable" and "collectible" amounts. In the case of the so-called *option de place* we have one place of payment, the others being only places of "collection;" [7] in the case of the *option de change* all the

2. Instances in App. Berlin (*Kammergericht*), March 13, 1926, *Juristische Rundschau für Privatversicherung*, 1926, 117 [marks, or in England, pounds sterling] and in the cases cited *infra*, n. 16 and n. 65.

3. For instance, in maritime freight contracts. See *Modiano Brothers & Son* v. *F. D. Bailey & Sons, Ltd.*, 47 Lloyds L.R. 134 (K.B., 1933).

4. For the sake of convenience only bonds will be referred to in the further discussion.

5. "*Change*" must be understood here as currency.

6. For instance by the Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung*, 54 II 257 at 276, *J.D. Int.* 1929, 497 at 505, and by Mixed App. Alexandria, Dec. 29, 1927, *Sirey* 1928 IV 4.

In the writer's *Das Geld* (1925) 203, the term "*alternative Währungsklausel*" was suggested for *option de change*; it was adopted by *Reichsgericht*, Nov. 14, 1929, *R.G.Z.* 126, 196; App. Cologne, Sept. 13, 1935, *J.W.* 1936, 203; Supreme Court of Austria, Dec. 17, 1930, *Die Rechtsprechung* 1931, 1.

7. The American concept of "collectible," as opposed to "payable," was used by App. The Hague in the case of the "Royal Dutch," *infra*, p. 430, judgment of Jan. 14, 1935, *Nederlandsche Jurisprudentie*, 1935, 119; by the Commercial Court of Berne, Feb. 23, 1939, *Bull.I.I.I.* XLI (1939) 95, 101; and by the Court (*Landgericht*) Berlin, May 15, 1935, Sack and Meyer-Collings, *Geld-und Valutaklausel in Deutscher und Niederländischer Gerichtspraxis* (1937) 167; it was misunderstood by App. Paris, April 24, 1940, *Revue Critique de Droit International* 1946, 821 (with critical annotations by Niboyet), and Trib. civ. Seine, July 23, 1936, *Sirey* 1938 II 25, to mean the same as "payable."

The contrast of "payable" with "collectible" is also used in the American law of guaranty, see Richardson, *Outline of the Law of Surety-*

places mentioned are places of "payment." Another American contribution to the pertinent terminology is the expression "multiple currency clause"[8] which has become customary in this country, and is unobjectionable if confined to the *option de change;*[9] the name of "multiple collection clause" resting on the technical significance of "collectible" may be suggested as an appropriate designation for the alternative *(option de place).*

Under either clause the debtor is legally obligated to procure the money for the holder at the place and in the currency indicated in the contract.[10] Either clause may be sufficient, under the local law, to give jurisdiction to the courts of the place of payment or collection.[11] Again there are cases which subject the bond wholly or partly to the law of the place selected by the holder.[12] Thus, decisive significance was attributed to that place by the Dutch *Hooge Raad* in the case of the "Royal Dutch."[13]

At the time the bond is issued, there will be, of course, no disparity between the financial effects of a "currency clause" and of

ship and Guaranty (2d ed., 1929) 7, but there is little connection between that matter and the present subject.

8. "Multiple currency clauses" are wholly different from "multiple currency rates" (or "multiple currency practices") arising from exchange control. *Infra*, p. 451.

9. However, there may be a multiple currency clause with no multiplicity of "places." In the frontier districts of the Netherlands, real estate transactions apparently were sometimes made with a provision allowing payment alternatively in Dutch money or in the money of the neighboring country, without providing for a foreign place of payment or collection. Court Maasstricht, Feb. 15, 1923, *Weekblad van het Recht* 1925 no. 11367, and cases collected by Levenbach, *De Spanning van de Kontraktsband* (1923) 261. Other instances are offered by *Booth & Co.* v. *Canadian Government Merchant Marine, supra*, p. 383, n. 28, and the cases cited *infra*, n. 30.

10. Even where no local paying agency was established, App. Paris, Nov. 25, 1926, *J.D.Int.* 1927, 700, or the existing agency had been discontinued. *Infra*, n. 18.

11. Swiss Federal Tribunal, Nov. 4, 1926, *Amtliche Sammlung* 52 III 165; Dec. 19, 1927, *ibid.* 53 III 196; Sept. 26, 1933, *ibid.* 59 II 355. Actually, Swiss law was not held applicable in these cases, but it was so held by the Superior Court of Zurich, Feb. 21, 1941, *Schweizerische Juristen-Zeitung* XXXVII (1941) 350, in the case of bonds of the "Royal Dutch" which, contrary to the opinion of the court, merely provided for an *option de place.* See also dictum in Trib. civ. Antwerp, Jan. 5, 1935, *Bull.I.I.* XXXII (1935) 93. The Federal Tribunal, March 28, 1930, *Amtliche Sammlung* 56 I 237, even suggests that stipulation by a foreign debtor government of a Swiss place of collection may give jurisdiction to the Swiss courts, overcoming the immunity of the foreign government.

12. *Infra*, p. 420, n. 16.

13. *Infra*, p. 430.

a "collection clause." [14] The divergence will develop as soon as the currency equilibrium existing at that time is disturbed. The question is whether multiple currency or multiple collection, may then become crucial. Just as after World War I, the creditors in the case of an ambiguous currency scrambled for the "hard" currency among the synonyms, so in the case of an option clause they interpreted it as a "multiple currency clause" presenting the bond or coupon at the place having the best currency. The debtors, of course, evinced the opposite tendency. Debtors domiciled in a territory of depreciated currency were extremely reluctant to pay more than the amount promised in terms of their national currency. Every imaginable argument, *pro* and *con*, was advanced in the widespread litigation. It is this group of cases which furnished the closest analogy to the gold-clause disputes.

On some points the courts were more or less unanimous. The debtor companies asserted repeatedly that the equation of sums in foreign money and sums in the debtor's national money in the multiple currency clauses only purported to inform the foreign holder of the relative value of the various currencies as of the time of issuance. For instance, the Austrian railway companies, in the "Austrian Coupon Cases" [15] advanced the argument that if a coupon promised "5 Austrian florins = 3 thaler 10 groschen = 12.50 francs" (in some cases "or" was used instead of the sign of equality) that merely constituted a more or less interesting narrative, without legal significance, and that only Austrian crowns or their present equivalent were promised. This type of defense was held good by the *Tribunal Civil de la Seine* [16] in the case of a life insurance policy issued by a French company to a Swede, the policy being signed in France and Sweden, and calling for insurance payment of "francs 3000 = kronors 2.160". However, this decision stands alone.[17] Frequently the companies in-

14. In *Rhokana Corp., Ltd.* v. *Inland Revenue Commissioners*, [1938] A.C. 380 (H. of L.), the income tax at the source on an English multiple currency bond, payable in London, New York, and Amsterdam, was computed on the sterling amount only, the court considering the rights to receive dollars or guilders solely ancillary. The view is explicable by the technical difficulties of collecting the tax at the source; it would be accurate in substance if applied to multiple *collection* clauses.

15. *Supra*, p. 126.

16. Judgment of Dec. 13, 1926, *J.D. Int.* 1927, 1035.

17. The *Reichsgericht*, Nov. 22, 1928, *Bank-Archiv* XXVIII (1929) 376, was confronted with a mortgage bond issued Jan. 1, 1921, at 5,000 marks, bearing the inscription "5000 marks—6250 francs—250 £, payable in Berlin". In January 1921, the £ was equal to about 250 marks, the pre-war parity being 20.50. In view of the fact, striking indeed, that the bonds were

voked the universal rule giving the choice in alternative obligations to the debtor, but this argument was rejected by the courts without exception. They all recognized that the purpose of the multiple currency clause was the offering of appropriate facilities to the prospective bondholder.[18] The trouble with this solution is that all the bondholders, in whichever country the bond was subscribed, will present the bond and the coupons for payment in that eligible country which offers the most favorable rate of exchange; and they can do so because the bonds are almost invariably payable to bearer, or, if not, are indorsable in blank, granting every holder the same rights and facilities. Consequently the debtor companies repeatedly tried to break up the homogeneous loan, *i. e.,* to discriminate between different bondholders, by interpreting the multiple currency clause to mean that the "hard" currency promised (for instance, Swiss francs) could only be claimed by holders of bonds originally subscribed in the country of that currency (in the above instance: in Switzerland.) This defense, however, was not accepted by the courts, the French Court of Cassation duly stressing the "indivisibility"

traded in at their mark value, that is, at about a *twelfth* of the sterling face amount, the court concluded that the reference to francs and pounds, reflecting the pre-war ratio, was considered as legally insignificant by the business community. The findings in the judgment on this very uncommon fact situation are not sufficiently detailed to allow a substantial appreciation. The "narration" theory was rejected in the *Austrian Coupon Cases, supra*, p. 126, n. 41, and by the Supreme Court of Austria, Dec. 17, 1930, *Die Rechtsprechung* 1931, 1, referring to this writer.

18. Cass., July 17, 1929, *J.D.Int.* 1929, 1075, *In re Banco El Hogar Argentino*, and numerous decisions of App. Paris, *e. g.*, Nov. 25, 1926, *J. D.Int.* 1927, 700; Jan., 19, 1928, *ibid.*, 1928, 671; *Reichsgericht*, July 1, 1926, *J.W.* 1926, 2675; Cass Lebanon, June 20, 1928, *Sirey* 1929 IV 1; App. Amsterdam, Jan. 21, 1927, *Weekblad van het Recht* no. 11633, *J.D.Int.* 1927, 770; App. Florence, July 13, 1937, *Foro Italiano* 1937 I 1124; App. Trieste, June 27, 1938, *R.D.Comm.* 1939 II 68; several decisions of the Supreme Court of Argentina, cited by Schoo, *Regimen Juridico de las Obligaciones Monetarias Juridicas* (1940) 639, n. 1775.

The *Banco El Hogar Argentino* had promised in its bonds to pay francs in Paris and "gold pesos" in Buenos Aires. When the franc began to depreciate, the company discontinued its paying service instituted in Buenos Aires. Of course, this attempt to create a *fait accompli* failed. See Lagarde, *L'Emission des Titres en France*, etc. (thesis, Poitiers, 1926) 205. [One of the cases cited by Schoo likewise refers to the loan of the Hogar Argentino.] The Austrian Supreme Court, June 1, 1937, *Bull.I.I.I.* XXXVII (1937) 245, rightly held the debtor liable to appoint new paying agents in the countries mentioned in the bonds after the original agents had discontinued their services.

of the loan.[19] The *Reichsgericht* at first denied German bondholders the right to receive Swiss francs on a pre-war loan which was payable in Germany in marks, and in Switzerland in Swiss francs,[20] but this ruling met with criticism [21] and was abandoned by the Court.[22]

The same question appeared in this country in 1933 after the dollar had begun to depreciate, while other currencies such as the Dutch guilder and the Swiss franc were holding their gold parity (for a while). This development affected some large American corporations which had issued bearer bonds and coupons payable—under multiple currency clauses—at the holder's choice in gold dollars, guilders, Swiss francs, etc. After the enactment of the Joint Resolution the corporations took the stand that holders of bonds subscribed in the United States had to be content with the normal dollar amount indicated in the bonds and coupons, but were not entitled to the guilders and Swiss franc amounts. Though the corporations were willing to pay the latter amounts to holders of bonds subscribed in the Netherlands or Switzerland, respectively, such holders had to submit affidavits thereon as prescribed by the corporations. This highhanded destruction of the bearer clauses [23] was just as little permissible under the Joint

19. Judgments of June 3, 1930, *J.D. Int.* 1931, 103 [loan of the *Crédit Foncier Franco-Canadien*] and of June 19, 1933, *ibid.* 1934, 939. Similarly, *McAdoo* v. *Southern Pacific R. Co.*, 10 F.Supp. 953 (N.D. Cal.1935); Austrian Supreme Court, June 1, 1937, *Bull.I.I.I.* XXXVII (1937) 245, and Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497 [loan of the *Crédit Foncier Franco-Canadien*]. On the failure of the *Reichsgericht's* attempt to discriminate among the holders of German gold-dollar bonds *infra*, p. 432.

Unified bonded loans have sometimes been broken up by acts of legislation. Discriminatory measures requiring affidavits from the holders were taken, for instance, by the Spanish Government in regard to its loans in 1898, 1901, and 1905, and by the Portuguese Government in 1916. Seignol, *L'Option de Change et l'Option de Place* (1935) 251, 247. Other instances are furnished by the Peace Treaties of St. Germain, Art. 203, annex par. 2, and of Trianon, Art. 186, annex par. 2, providing for a distribution of the bonded Austrian public debt among the "successor states." See Feilchenfeld, *Public Debts and State Succession* (1931) 500, 842, 880. The method used was to stamp the bonds. The repercussions of those measures on foreign markets are judicially illustrated by App. Jena, Nov. 3, 1921, *Bank-Archiv* XXII (1922) 69.

20. Judgment of Dec. 21, 1925, *J.W.* 1926, 1320.

21. See the writer's annotation *J. W.* 1926, 1320 and Springer, *Bank-Archiv* XXV (1926) 291.

22. Judgment of July 1, 1926, *J.W.* 1926, 2675; Dec. 22, 1927, *Bank-Archiv* XXVII (1927) 162.

23. Or of the blank endorsements.

Resolution as under the general law of contracts.[24] However, it will be seen that the corporations, with no break-up of the loans, finally obtained much more than they had originally aspired because the multiple currency clause in its entirety was deemed to be an invalid gold clause.[25]

Differentiation between *options de change* and *options de place* has not often been the core of a litigation.[26] The distinction, though not explicitly referred to, played a role in a Canadian case, *Royal Trust Co.* v. *Oak Bay*.[27] The bonds sued upon called for payment of 500 Canadian dollars or £102.14s.10d "its sterling equivalent at the rate of $4.86-2/3 to one £" payable in Toronto, London and other places, at the option of the holder. This was a multiple currency clause entitling the holder either to $500. or to £102.14s.10d. It was a particular feature of the case that the ratio underlying the pound and dollar amounts was stated in the body of the bond, giving the semblance of a mere *option de place.* However, the statement was explanatory only. The definite amounts alternatively offered to the holder left little doubt that he had a choice between them; the *option de change* was, so to speak, disguised as an *option de place.* Nevertheless the court awarded only Canadian dollars which were then at a discount.[28]

II. Ambiguous Currency Terms in Multiple Options

The situation is particularly fruitful of litigation where the option clause is couched in ambiguous currency terms such as "francs." If, for instance, a bond or coupon calling simply and plainly for a payment of "francs" is payable in Paris, Brussels and Zurich, the question becomes critical whether the holder is, at his option, entitled to French, Belgian or Swiss francs, according to the place of presentation, or whether there is a basic franc, say the French franc, determinative through the rates of exchange of the payments to be made in Belgium and Switzerland.

24. For details see the writer's article, "Multiple currency and index clauses," 84 U. of Pa.L.Rev. 569 (1936).

25. *Infra*, p. 435.

26. In the case of Finland's American gold-dollar loan of 1928, which gave the bondholder the right to collect in Amsterdam the equivalent in guilders of the gold-dollar amount owed, only the equivalent of the nominal dollar amount was held collectible in Amsterdam, after the enactment of the Joint Resolution. City Court of Helsingfors, Dec. 23, 1937, *Bull.I.I.I.* XXXVIII (1938) 280. In the case of a multiple currency clause, the conclusion should have been the opposite.

27. [1934] 4 D.L.R. 697 (British Columbia Sup.Ct., 1934).

28. The court listed a number of cases which were either irrelevant or supported the contrary view and then concluded abruptly with a holding for the defendant.

In such a situation the presence of an *option de place* is indicated where a definite amount is stated in one currency only, while the sums to be paid in the other currencies are to be computed at the rate of exchange of the former currency.[29] Otherwise an *option de change* should be held to exist.

This view casts a burden upon the issuer if he is domiciled in the country where the money is depreciated. However, if he has appealed to the investors of a foreign capital market, by instituting and advertising agencies for the service of the loan [30] there and has employed the name of the money current in that country, it is fair to assume that the prospective investors interpreted that name to refer to their national currency and that the issuer expected them so to understand the reference. To put it another way, the promise here, too, must be construed under the circumstances in which it was understood at the place of payment.[31] Canadian,[32] Swiss [33] and Egyptian [34] decisions are in accord with this view. Similarly a New Zealand municipality which had issued pound bonds payable in Auckland and London, before the English and the New Zealand pound had become separated, was held by the Privy Council to be liable to redeem its bonds in English pounds. That the New Zealand municipality had borrowed

29. This solution is fortified by the well-known rule which requires that the party submitting a form contract to the public should make its meaning clear, failing which doubts arising out of unsatisfactory draftsmanship will be settled adversely. See, in general, Williston, *Contracts* (rev. ed., 1933), sec. 621; and particularly as to the situation before us, Swiss Federal Tribunal, in the case of the *Crédit Foncier Franco-Canadien*, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497, 502, and Mixed App. Alexandria, April 12, 1928, *ibid.* 1928, 777, 783.

30. Lyons-Geneva Railroad bonds of 1856, subscribed to in France and Switzerland, called for payment in francs with no Swiss place of payment. A simple French-franc indebtedness existed, the issues being those of a French corporation. *Cour de Justice* of Geneva, April 25, 1934, cited by Pictet "L'Option de change", in *Zeitschrift für Schweizerisches Recht* LIV (1935) 318. Nor were foreign places of payment provided in the case decided by the *Reichsgericht*, Nov. 22, 1928, *supra*, p. 390, n. 17.

31. *Reichsgericht*, Nov. 14, 1929, *R.G.Z.* 126, 196, 208 (Viennese loan of 1902), quoting this writer.

32. *Corporation des Obligations Municipales Limitée* v. *Ville de Montréal Nord*, 59 *Rapports Jud. Québec, Cour Sup.* 550 (Superior Ct. 1921); *Les Commissionaires de L'École de la Municipalité Scolaire de St. Charles* v. *La Société des Artisans Canadiens Français*, 33 *Rapports Jud. Québec, Banc du Roi*, 448 (K.B., 1922).

33. Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497, 504 [loan of the *Crédit Foncier Franco-Canadien*.]

34. Mixed App. Alexandria, April 12, 1928, *J.D.Int.* 1928, 777 [loan of the *Caisse Hypothécaire D'Égypte*, a Belgian corporation].

in terms of a foreign currency was held not *ultra vires.*[35] But a Belgian and a Danish court for dubious reasons took a different view, the Belgian court when passing on coupons of a Belgian company issued in terms of "francs" and payable in Brussels, Paris and Switzerland,[36] and the Danish court in the case of a kronor loan of a Danish company, payable in Copenhagen and in Stockholm.[37] In both cases the debtor was held to be obligated only in his depreciated national money. Again, in *Broken Hill Proprietary Co., Ltd.,* v. *Latham and others,* the English Court of Appeal [38] held that bonds issued by an Australian company and payable in pounds in certain Australian cities and London, must be interpreted as calling for payment of (depreciated) Australian pounds, Lord Hanworth dissenting in a strong opinion; thus to the detriment of the English bondholders, the majority found that merely an *option de place* based on Australian currency existed. This case, however, was explicitly overruled by the House of Lords in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[39]

The only American case in point is rather unfortunate. Before World War I, bonds had been issued by American railway companies in terms of "francs," payable in France, Belgium and Switzerland. When a bondholder claimed Swiss francs to be paid in Switzerland, the Appellate Division of the New York Supreme Court, reversing the sounder decision of the court below, dis-

35. *Auckland Corp.* v. *Alliance Assurance Co. Ltd.*, [1937] A.C. 587 (Pr.C., 1937).

36. App. Brussels, March 11, 1921, *Pasicrisie Belge*, 1921 II [loan of the *Compagnie Générale pour l'Eclairage et le Chauffage per le Gaz*]. The situation was different in the case of the bonds of the (Belgian) *Compagnie Internationale des Wagons-Lits*, where payment of francs in "Paris, Brussels, Liége, Cologne, Amsterdam and London," was promised. In view of the three last mentioned places of payment no *option de change* was in question, and an independent "international" gold franc, namely, a franc of the Latin Monetary Union never did exist. Cass. Dec. 6, 1933, *D.H.* 1934, 34; App. Paris, July 23, 1931, *Gazette du Palais*, 1934 I 894; and passing on the same loan App. Berlin (*Kammergericht*) Sept. 25, 1928, *J.W.* 1929, 446. As to the Latin Monetary Union, see *infra*, p. 506. There is a somewhat comparable common law case in *Saskatoon City* v. *London and Western Trusts Co., Ltd.*, [1934] 1 D.L.R. 103 (Saskatchewan Court of Appeal, 1933), regarding dollar debentures payable in Montreal, New York and London. This meant Canadian dollars.

37. Supreme Court of Denmark, Dec. 17, 1925 *J.W.* 1926, 2030 (loan of the *Kongeriget Danmarks Hypotekbank*), with a forceful critical annotation by Professor Henry Ussing, Copenhagen.

38. [1933] Ch. 373 (C.A., 1932).

39. [1934] A.C. 122 (H. of L., 1933).

missed the suit,[40] because the bond was written in the French language and "franc" was defined "by several dictionaries" as "French coin"—evidently a fallacious argument. By this judgment the American company which received its earnings in undepreciated dollars obtained an extraordinary profit indeed.

Another way of distorting multiple option clauses is to construe them as tacit gold clauses. The general trend of courts to refrain from the assumption of tacit gold clauses [41] prevails also in the field of multiple options. An English case is in point. In the Morgan loan of 1917 the English government had promised to pay the bondholders gold coin in New York, or, in London, sterling money at the fixed rate of $4.86½ to the pound. After the United States had abrogated the gold clauses the question arose, among others, whether or not the gold guaranty extended to the sterling promise. This question was answered in the negative by the Court of Appeal,[42] Lord Wright expressly stating for the Court: "The two options are entirely independent. Each provides for the payment of a particular sum in a particular place in a particular way . . . the gold clause is not imported in any way into the London option." As a matter of fact the divergence between the two option formulas is explainable. Corroborating a sterling promise by a gold clause would have been unusual.[43] Had the British Government done it during the war it might have affected the credit of the English pound. Morgan and Co. was content with a gold dollar clause. The Company and the bondholders relied, as did other bankers and investors, on the imperturbability of the gold dollar and consciously renounced a gold sterling clause.

40. *Levy* v. *Cleveland, Cincinnati, Chicago and St. Louis R. Co.*, 210 App.Div. 422, 206 N.Y.S. 261 (1921). In passing, the court remarks that "France was the place of issue of the bonds." The meaning is probably that the loan was floated or subscribed primarily in France, a financial transaction not referred to in the bonds and therefore legally irrelevant to the bondholders. Had the bonds named Paris as the place of issuance, this would have been an excellent reason for the conclusion reached. The court relied also on the Belgian *Compagnie Générale* case, *supra*, n. 36, entirely overlooking the fact that there a Belgian issuer and Belgian francs were involved, not to speak of the questionable argument used by the Belgian court.

41. *Supra*, p. 239.

42. *International Trustee etc.* v. *The King* [1937] A.C. 500, 522. This part of the judgment was not appealed. See the remarks by Lord Maugham at 561. More on this case, *infra*, p. 424.

Interpreting Italian monetary legislation, the Ital. Cass., July 29, 1938, *Foro Italiano* 1938 I 1527, likewise stressed the independence of the alternatives offered by a multiple currency clause. There is no such independence in the case of a multiple collection clause, *supra*, p. 389.

43. *Supra*, p. 228.

The contrary view, favoring the creditors, was taken by the French *Cour de Cassation* [44] and the Swiss Federal Tribunal [45] in respect to the pre-war loan of the Turkish *Société d'Héraclée* whose coupons ran in terms of "(25) francs or 110 gold piasters" and were payable in Constantinople in gold piasters, in Paris in francs, in Geneva "at the rate of exchange". The same provisions applied to the bonds called in. Apparently it was intended to protect the bondholders against monetary manoeuvres of the Turkish government whose record in that respect was none too good at the time.[46] "Francs" were to be paid in Geneva as well as in Paris and French francs were meant, as is evident from the reference to the "rate of exchange".[47] After Turkey had invalidated gold clauses,[48] the situation, in view of the bonds and coupons, was more propitious to the debtor than in the case of the Morgan loan. The French and the Swiss courts, however, on questionable grounds read into the bonds and coupons a gold guaranty covering all three alternatives, regardless of the Turkish law. The *Cour de Cassation* again employed its concept of an "international loan" which in the opinion of the court imposed the interpretation used, but the Swiss Tribunal, though reaching the same result,[49] rejected that theory.

44. July 7, 1931, *J.D.Int.* 1932, 403 at 416, adopting the theories and conclusions of the *Procureur Général* Matter at 403.

45. Feb. 11, 1931, *Amtliche Sammlung* 57 II 69, *J.D.Int.* 1931, 510.

46. See Blaisdell, *European Financial Control in the Ottoman Empire* (1929).

47. Some issues of the Serbian loans passed on by the Permanent Court of International Justice, called for payment of gold francs in Paris and for payment of local currency "at the sight rate of exchange in Paris" in certain other places. Hence the equivalent in paper francs of the gold francs promised had to be computed and then to be converted, at the rate of exchange, into the local currency. *J.D.Int.* 1929, 997. This painstaking and unusual procedure presupposes the existence of a reference to *gold* francs.

48. *Supra*, p. 281, n. 5.

49. In the matter of the Tokyo loan, finally decided by the *Cour de Cassation*, *infra*, n. 66, App. Besancon, Dec. 12, 1928, *J.D.Int.* 1929, 1062, advanced the theory that a multiple currency clause, giving an alternative claim to pound sterling, *per se* implies a gold clause because it presupposes an equivalence of currencies, possible only on a gold basis. The underlying theory, the fallacy of which is obvious, was refuted at length by Seignol, *supra*, n. 19 at 152. Mr. Seignol himself refers to an alleged judgment of Mixed App. Alexandria, Jan. 21, 1938, *Journal des Tribunaux Mixtes* of Jan. 27 and 28, 1933, *J.D.Int.* 1933, 428, as employing the same theory. In reality the judgment was rendered by the Civil Tribunal of Cairo and did not rest on that theory. Nor is the latter supported by Mixed App. Alexandria, May 19, 1927, *J.D.Int.* 1928, 765, also referred to by Mr. Seignol. More recently the "unity" doctrine in re-

Multiple currency clauses have very seldom been abrogated by express legislative enactment [50] but as mentioned have been affected by judicial stretching of gold clause abrogation.[51]

III. The Course of the French Courts

The French cases on multiple option clauses present a challenging counterpart to the French gold clause theory. Before World War I, a number of French companies had floated loans in France and in Switzerland, the bonds being phrased merely in terms of "francs" and made payable in certain French and Swiss places at the agencies indicated in the bonds and coupons. All these bonds were listed on Swiss stock exchanges. Contrary to the gold clause situation, the French were now on the debtors' side in this typical factual set-up.[52] Would the French courts, which in the gold clause cases took a course so extremely favorable to the creditors, under reversed factual conditions again protect the creditors? [53] They did not. While the trend in the lower and appellate courts was originally more favorable to the creditors,[54] the *Cour de Cassation,* discarding the familiar place-of-payment theory,[55] laid down striking pro-debtor rulings in several leading decisions. In the case of the bonds of the Company *L'Est Lumière,* the company, sued by a Swiss bondholder for Swiss francs, set up

spect to multiple currency clauses has been rejected by Ital. Cass., *supra*, n. 42.

50. According to Domke, "Les efforts legislatifs tendant à restreindre la validité de la clause or," *Revue Critique de Droit International* 1938, 22 at 24, no. 2, Norway, by a law of July 6, 1933, enacted special restrictions with regard to the rights of Norwegian holders of multiple option bonds.

51. *Infra*, p. 435.

52. A Swiss debtor corporation was involved in the case of the *Papeteries de Courtelary et Chenevières*, the bonds of which were payable in Switzerland and France. App. Nancy, Nov. 9, 1926, *J.D.Int.* 1928, 96, assuming an *option de place*, held the Papeteries liable only for payment of French francs. The circumstances were extraordinary, however. The whole of the loan, designed for the establishment of a plant situated in France, had been subscribed to in France and the bonds carried several exclusively French references (no deduction of French income tax; debt dischargeable through payment into the *Caisse de Dépots et Consignations* of a French City; domicile elected in France; a French bank being the only representative [trustee] of the bondholders, etc.) The decision seems fully justified.

53. *Supra*, p. 262, *infra*, p. 431.

54. See, on the one hand, App. Parts, Jan. 7, 1932, *Gazette du Palais*, 1932 II 651, *infra*, n. 57; same court, Feb. 14, 1934, *Gazette du Palais*, 1934 I 796, *infra*, n. 61; App. Besançon, Dec. 30, 1931, *D.H.* 1932, 123, n. 51; on the other hand, App. Besançon (different division), Dec. 28, 1931, *Gazette du Palais*, 1932 II 655.

55. *Supra*, p. 376.

as a defense that according to their correspondence the Swiss banking houses entrusted with the service of the loan had "received" the subscriptions to the loan in French francs and that it was in such francs that the company was credited. The *Cour de Cassation,*[56] reversing the decision of the Appellate Court of Paris,[57] held this defense good, considering it entirely immaterial "how small the discount between the two currencies may have been". However, the defense was immaterial, so far as the *bondholders* were concerned, at least to the extent that it was based on the correspondence between the issuer and its Swiss *banks*. The bonds and the prospectus were conclusive as to the rights of the bondholders [58] and contained nothing about "French" francs. As to the fact that the company had "received" the subscriptions in francs, the court did not make clear what it meant. Apparently no more than that the *company* had been credited for the subscribed amount in French francs. Yet one must presume that the Swiss banks debited their Swiss *customers* in terms of Swiss francs; there is, in the cases, no indication to the contrary. Even assuming that the subscription forms did carry a reference to French francs no serious importance could be attributed thereto, both currencies having been at par. Since no such reference was incorporated in the bonds or prospectus, however, it could not militate against a bondholder.

Another judgment of the *Cour de Cassation*—regarding the bonds of the *Papeteries Bergès,*[59]— is similar. French real estate of the company had been mortgaged to bondholders who in their application to record the mortgage figured the amount of the debt in terms of French francs because under French law that is a prerequisite of public registration. The *Cour de Cassation,* again reversing the decision of the Appellate Court,[60] inferred from the statement in the subscribers' application that the latter, having made no reservation as to the currency, had thereby fixed the money of contract in terms of French francs. A reservation, however, would have been ineffective and irrelevant and was therefore not to be expected considering the attitude of French law. True, the prospectus stated that the subscribers in their application had evaluated the principal of the debts "as of a number

56. June 5, 1934, *J.D.Int.* 1935, 90.

57. Judgment of Jan. 7, 1932, *supra,* n. 54.

58. As was acknowledged three years later by the same court in the decision cited in n. 62. The latter view cannot be questioned, see *e. g.,* Lacour & Bouteron, *Précis de Droit Commercial* I (3d ed., 1925) 761.

59. July 21, 1936, *J.D.Int.* 1937, 299.

60. Judgment of the Besançon Court, Dec. 30, 1931, *supra,* n. 54.

of francs equal to the face amount of the bonds", but there is no justification whatsoever for inferring from this information as the Court did, that it was intended to give the bonds a French-franc character. Certainly Swiss investors could not be supposed to be aware that French law did not allow mortgage registration except in terms of French francs. The reasoning of the court is all the more puzzling since the same company had previously issued bonds under the clause "payable at the rate of exchange on Paris" but had omitted this reference in the bonds at bar. A year later the holders of the bonds of another French company, *The Société des Hotels Splendide, Royal and Europe d'Aix-les-Bains,* suffered the same fate. In this case there were only Swiss places of payment, the entire loan having been floated in Switzerland. The Appellate Court of Paris therefore gave judgment against the company for payment of Swiss francs.[61] The bonds, however, were secured by a first mortgage on French real estate and this fact had been mentioned in the prospectus. What should have added to the bondholders security proved their undoing. The *Cour de Cassation,* reversing the Appellate Court, held for the French company on the same ground as in the *Papeteries Bergès* case, despite the absence of any French place of payment.[62]

In the fourth case, regarding the bonds of the French *Brasseries de Sochaux*[63] the *Cour de Cassation* relied primarily on the incidental fact that the bondholders knew the company operated on a French-franc basis. This fact is certainly inconclusive since each and every company seeking foreign capital operates on the basis of its domestic currency. Furthermore the court stressed the fact that the quotations of the bonds on the Swiss stock exchanges had always corresponded to their value in terms of French francs. Still in the analogous cases of alleged gold bonds the French courts never took into account whether or not the expectation of gold was a factor in raising bond quotations. Generally it was not;[64] nor will ordinarily the influence of such an expectation be provable judicially. The very fact that a foreign corporation may refuse to honor the terms of a bond

61. Judgment of February 14, 1934, *supra*, n. 54.

62. Judgment of July 19, 1937, *D.H.* 1937, 567. The decisions of the *Cour de Cassation* compare unfavorably with Trib. civ. Seine, April 30, 1923, *D.P.* 1923 II 131, where, under a "franc" contract, the Swiss creditor was awarded Swiss francs although there was not only a mortgage on French real estate but various other remarkable "contacts" with France. Nevertheless the stronger Swiss contacts were properly held decisive.

63. Judgment of July 17, 1935, *J.D. Int.* 1936, 880, affirming App. Besancon, Dec. 28, 1931, *supra*, n. 54.

64. See *supra*, p. 243, n. 30.

and that a law-suit thereon must be conducted in the foreign country is sufficient to keep quotations down.

On the basis and in the spirit of these decisions still other "multiple-franc-bond" cases were disposed of by French courts.[65]

Of a somewhat different character but not less challenging was the *Cour de Cassation's* treatment of the loans emitted by the city of Tokyo prior to World War I. In this case not even a multiple currency clause existed. The loan had been divided into three separate parts ("tranches"), an English tranche payable in London, an American one payable in New York, both running in terms of pounds sterling, and a French tranche, running in terms of francs, payable in Paris and "at the rate of exchange on Paris", in Brussels. The *Cour de Cassation*[66] found that on the French tranche also, pounds sterling rather than francs were owed because in the prospectus of the loan the total of interest and amortization to be supplied annually for the service of the three tranches was phrased in terms of pound sterling. However, no more was obviously intended by the prospectus than to give a survey of the cost of the service, probably contrasted with the receipts of the city, and this could properly be done only on the basis of a single currency, the English currency being the most appropriate under the circumstances.[67] No change in the unambiguous

65. Judgments of App. Paris, May 3, 1935, *J.D.Int.* 1936, 624 (*Papeteries Bergès*) and *Nouvelle Revue de Droit International Privé*, 1935, 337 (*Fabrique de Pâtes à Papier et de Cartons du Sud-Est*); Dec. 20, 1935, *Gazette du Palais*, 1936 I, Index p. 102, §§ 6, 7 (Lyons-Geneva R. R. Bonds); App. Amiens, Jan. 30, 1935, *D.H.* 1935, 203 (*L'Est-Lumière*). In a sense, one may include in this group also the Heraclea case, *supra*, n. 44.

Cass., Feb. 24, 1937, *Nouvelle Revue de Droit International Privé*, 1937, 589, allowing the *Crédit Foncier Franco-Canadien* to pay in Switzerland certain bonds in French francs, does not state the wording of the bonds exactly enough to permit the forming of an opinion. Where a Frenchman had contracted in Switzerland with a Swiss life insurance company for a franc annuity payable in France or in Switzerland, the company was held liable to pay Swiss francs. Cass., March 31, 1933, *J.D.Int.* 1934, 373, affirming App. Paris, May 10, 1928, *Gazette du Palais* 1928 II 430. The adjudication was to the contrary, however, where the contract was made in France with the "frenchified" branch establishment of the Swiss company. Cass., Nov. 28, 1932, *J.D.Int.* 1934, 133. See *supra*, p. 272, n. 54. This distinction seems warranted, however.

66. Jan. 14, 1931, *J.D.Int.* 1931, 126 at 153 (two cases), conformable to the plaidoyer of *Procureur Général* Matter at 129.

67. Savatier, *D.P.* 1931 I 10, commenting on the judgment, well poses the question whether the theory of the Court would have been the same had the pound depreciated rather than the franc. The Supreme Court of Japan in December, 1934, decided contrary to the

terms of the bonds and coupons could fairly be inferred therefrom. The theory of the court made entirely nugatory the separate formulation and monetary denomination of the French tranche.[68] It is most gratifying to state that French writers have opposed these judgments of the *Cour de Cassation*.[69]

Section 28

FOREIGN CURRENCY IN DAMAGES AND OTHER UNLIQUIDATED DEBTS

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I. Foreign Currency Incidental to Damages [1]

In common law countries, damages, under the compulsory conversion rule,[2] can only be granted in the currency of the forum, regardless of where the damage occurred, of which state the parties are nationals or residents, and which currency the dam-

judgment of the *Cour de Cassation*. Thereafter the Japanese Vice-Minister of Finance issued a strong statement against the French judgment, U. S. Dept. of Commerce, *Handbook of Foreign Currencies* (1936) 120.

An attitude exactly opposite to that of the *Cour de Cassation* was taken by the *Reichsgericht* in the case of the pound loan of the City of Hamburg, judgment of February 7, 1938, *J.W.* 1938, 1109, *supra*, p. 241, n. 16. Regarding the independence of the several branches of a single loan see also next note.

68. The independence of the French tranche of the loan was recognized by the *Cour de Cassation* when applying French legislation on collective protection of bondholders. Judgment of Dec. 28, 1938, *Gazette du Palais* of Feb. 23, 1939.

69. The *L'Est Lumière* case was criticized by Professor André-Prudhomme, editor of the *Journal de Droit International*, in *J.D.Int.* 1935, 90 at 93; by Seignol, *supra*, n. 19 at 229; and in *Gazette du Palais*, 1934 II 87 at 89 (anonymously). The *Papeteries Bergès* and *Brasseries de Souchaux* cases were disapproved by Professor Perroud in *J.D.Int.* 1936, 883; 1937, 301. The present writer does not know of any literary support of the decisions.

1. The American and English writings cited supra, p. 364, n. 210, cover this subject also. On English law, Mann, *The Legal Aspect of Money* (1938) 289. See, furthermore, Ascarelli, "Risarcimento del danno e moneta estera," *Foro Italiano*, 1929 I 753; *id.*, *Saggi Giuridici* (1949) 379, 383; and Béquignon, *La Dette de Monnaie Étrangère* (1925) 24.

2. *Supra*, p. 364.

aged party expended for the purpose of reparation. The day when the claim arose—in tort cases the day when the tort was committed—is generally recognized as determinative for the conversion of the foreign currency [3] which is thereby degraded to a "money of measure." This is in accord with the breach-day rule of the law of contracts; as a matter of fact the rule is generally considered as a single one looking to the day when the wrongful act, tort or breach, occurred.[4] Still under Mr. Justice Holmes' rule in *Deutsche Bank* v. *Humphrey*,[5] damages originating abroad under foreign law and in a foreign currency are to be converted under the judgment-day rule.[6] A theory tending to the contrary, however, was advanced by the English Court of Appeal to the effect that claims for damages, if submitted to an English court, are considered to call at the outset for payment in English pounds.[7] If, for instance, a tort was committed in Italian territory, Italian law governing, and a loss in lire was inflicted upon the injured party, the wrongdoer, suing in an English court, would not be able, under this theory, to discharge his obligation by tendering payment in Italian money. This deviation from the debt rule certainly makes things simpler for the court but runs counter to the natural course of events and affords the creditor another reason for using legalistic manoeuvres to invoke the jurisdiction

3. *The Verdi*, 268 F. 908 (S.D.N.Y. 1920); *Page* v. *Levenson*, 281 F. 555 (D.C.Md. 1922) [both tort cases]; *Moser* v. *Corn*, 140 Misc. 417, 249 N.Y.S. 606 (1931), *aff'd*, 234 App. Div. 842, 254 N.Y.S. 922 (1931) [conversion]; *S. S. Celia* v. *S. S. Volturno*, [1921] 2 A.C. 544 (H. of L.); *The Baarn*, [1934] P. 171 (C.A. (both tort cases); *Di Fernando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409 (C.A.); *Barry* v. *Van den Hurk*, [1920] 2 K.B. 709 (K.B.); *Lebeaupin v. Crispin*, [1920] 2 K. B. 714 (K.B.) [unliquidated damages]; *Re British-American Continental Bank, Ltd—Goldzicher and Penso's Claim* [1922] 2 Ch. 575 [unliquidated damages in the winding up of the bank]; *McDonald* v. *Wells*, 45 C.L.R. 506 (High Ct. of Australia, 1931) [rescission]; *Compagnie Maritime Normande* v. *U. S.* (1938) Am. Mar. Cases 347 (S.D. N.Y. 1938) [tort]. *The Baarn* case has been annotated by Schoch, In Istituto di Studi Legislativi, *Giurisprudenza Comparata di Diritto Internazionale Privato*, IV (1938), 246.

4. See *Hoppe* v. *Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1923), professing to make no distinction between debt, unliquidated damages, and torts; Fraenkel, "Foreign money in domestic courts," 35 Col.L.Rev. 360, 386 (1935).

5. *Supra*, p. 367.

6. *The Integritas*, 3 F.Supp. 891 (D.C. Md., 1933) [unliquidated damages]; *The West Arrow*, 80 F.2d 853 (C.C. A.2d, 1936). The same view already appears in *The Hurona*, 268 F. 910 (D.C.S.D.N.Y., 1920). On the conversion day in insurance *supra*, p. 373, n. 59.

7. In the *Baarn* case, *supra*, n. 3 (opinions of Greer, L.J., and Romer, L.J.).

of an English court.[8] The doctrine criticized has not yet been used by American courts.

In civil law courts, as was seen, there is generally nothing to prevent judgments from being rendered in terms of foreign money or in an amount of the national money equivalent at the time of payment to a certain sum of foreign money. Nevertheless, there is a strong tendency in the field of damages to fix them in terms of the national currency. This tendency is apparent in German judgments,[9] and also in other civil law decisions.[10] It is probably brought about by a need for simplification, since damage situations involving foreign currency are particularly intricate.

Logically, the first problem is to ascertain what may be called, —analogously to the "money of contract"— the "money of damages," *viz.* the currency in which under the applicable law reparation must be made or—what amounts to the same—the currency in which the judgment must be rendered save for the compulsory conversion rule. One school of thought asserts that the money of the territory whose law governs the case is the money

8. See the opinion of Scrutton, L.J., in the *Baarn* case.

9. In the case of *Reichsgericht*, Feb. 27, 1924, *J.W.* 1925, 1477, a shipper had been prejudiced by the fact that he had to pay a guilder fine to the Rotterdam port authorities, owing to wrong declarations made by the defendant. The latter was held liable to pay guilders, a natural solution under the circumstances. See furthermore *Reichsgericht*, Oct. 28, 1922, *R.G.Z.* 105, 312 [damages in Swiss francs on the basis of the Berne International Convention, *infra*, p. 406]. In the following cases, however, marks were awarded. Judgments of June 4, 1919, *R.G.Z.* 96, 121; Feb. 8, 1921, *R.G.Z.* 102, 60; March 29, 1922, *Warneyers Rechtsprechung* 1922, 98; May 6, 1924, *ibid.*, 1923/1924, 178; June 30, 1925, *R.G.Z.* 111, 183 [gold mark]; Oct. 24, 1925, *J.W.* 1926, 360; Dec. 9, 1927, *Höchstrichterliche Rechtsprechung* 1928, n. 610. In the 1919 case the reason was advanced that due compensation can be made by awarding an amount in the national currency. The 1922 and 1924 cases confine the rule, unconvincingly enough, to lost profits *(lucrum cessans)* which were then involved. The judgments of Dec. 7, 1923, *Hanseatische Gerichtszeitung* 1924, 64 and April 28, 1924, *J.W.* 1924, 1593 stress the point that both parties were Germans. The "local-payment" doctrine, *supra*, p. 360, is almost immaterial in the face of these rulings; in fact, it is applicable only in the case of debts. *Accord:* Ital. Cass., July 20, 1936, *Foro Italiano*, 1936 I 1118 [construing Art. 39 of the Commercial Code of 1865]. *Contra: Reichsgericht*, Oct. 28, 1922, *R.G.Z.* 105, 312, but this view has disappeared in the later cases.

10. Ital. Cass., June 11, 1926, *Giurisprudenza Italiana*, 1926 I 1096; July 20, 1936, *Foro Italiano*, 1936 I 1118; App. Rennes, May 12, 1927, *J.D.Int.* 1929, 680; Swiss Federal Tribunal, May 3, 1921, *Amtliche Sammlung* 47 II 190; Court Rotterdam, Dec. 20, 1933, *Weekblad van het Recht* 1933, no. 12819, p. 4. French courts seem more inclined

of damages, particularly in tort cases.[11] However, the question of the currency involved is primarily a matter of fact rather than of law; in a tort situation governed by American law, say in a collision of English ships in American waters, damages may arise in English money. Moreover, it is undesirable to tie up the determination of the "money of damages" with the hazy and contradictory Conflict-of-Laws doctrines referring to contracts, quasi-contracts and torts all of which may give rise to damages. While this negative tenet may be considered as rather certain it is difficult to set up an affirmative standard for the determination of the "money of damages." The best standard comparatively seems to be the currency under which the damaged party did his business or, if without business, was living. This means practically that the currency of his domicile should normally be contemplated. For instance,—to change slightly the fact situation in the *Baarn* case [12]—if a Chilean ship collides with a Dutch ship in Ecuadorean waters and is repaired in a Peruvian port, the Chilean money expended to obtain the needed Peruvian exchange should be the amount to be converted into dollars, if suit is brought in the United States. As a matter of fact, the business of the Chilean shipowner is supposed to be run on the basis of Chilean currency, and even if the loss sustained consisted in the loss of sterling freightage the normal assumption should be that the Chilean would ordinarily have converted the sterling currency into his national money.[13] However this is no more than a flexible standard to be resorted to in case of doubt.

to determine damages in foreign money and to give judgment thereon in the manner stated *supra*, p. 374, n. 65. Cass., May 3, 1946, *Chronique Bimensuelle du Recueil Sirey* 1946, 52 [damages sustained in France, but repair abroad]; App. Lyon, May 31, 1938, *J.D.Int.* 1939, 103; App. Rouen, Nov. 26, 1924, *ibid.*, 1925, 672. The latter court held "delay interest" should be computed on the franc equivalent of the foreign money owed, assessed at the date when suit was brought.

11. Thus by Pisco, *Lehrbuch des Oesterreichischen Handelsrechts* (1923) 155. The same theory has been used by the courts, usually to justify the use of the national currency. Austrian Supreme Court, June 23, 1925, *Die Rechtsprechung* 1926, 36; App. Hamburg, March 15, 1922, *J.W.* 1922, 1142; App. Brussels, Nov. 17, 1923, *Revue de Droit Maritime Comparé* VI (1924) 134. Similarly, in *Gerli & Co.* v. *Compagnie Générale Translantique*, 132 Misc. 752, 230 N.Y.S. 282 (1928), damages for breach of contract were computed in terms of French francs on the ground that the contract was French.

12. *Supra*, n. 3.

13. Similarly: *Det Forenede Dampskibs Selskab* v. *Insurance Co. of North America*, 31 F.2d 658 (C.C.A. 2d, 1929), and the reasoning of the court in the *Wimbledon* case, *infra*, n. 42.

The rigid conversion rule of the common law injures the creditor if the *moneta fori*—pound or dollar—depreciates after the law day of conversion; courts will not grant compensation for a depreciation (or devaluation) of their domestic currency.[14] On the other hand, the conversion rule affords the creditor protection if the foreign "money of damages" depreciates subsequent to the conversion day. Civil law courts exhibit a tendency to throw the risk of depreciation of the money of damages upon the wrongdoer.[15] The *Reichsgericht* occasionally even granted damages in terms of "gold marks," [16] a device available under a German procedural statute.[17]

The national laws on damages have in some points been modified by international agreements. The English Carriage-by-Air Act, 1932 [18]—based on the Warsaw Convention for the Unification of Certain Rules Regarding Air Transport of 1929,—prescribes the date of judicial ascertainment of damages, *i. e.*, the judgment-day as decisive for the conversion into pounds. No controversy on the application of this provision seems to be on record. However, much litigation has arisen in continental courts with regard to the Berne International Convention Concerning the Traffic of Goods by Rail of 1890,[19] a multilateral treaty adhered to

14. *Supra*, p. 182. In *Pilkington* v. *Commissioners for Claims on France*, 2 Knapp 7 at 20, 12 Eng. Rep. 381 at 386 (Pr.C., 1821), regarding the depreciation of the French franc during the French Revolution, one reads this broad statement: "If the [wrongful] act is to be undone, it must be completely undone, and the party is to be restored to the situation in which he was at the time the act to be undone took place." The bearing of this case, which arose from the confiscation of an Englishman's assignats by the French Government, is doubtful. See Mann, *supra*, n. 1, at 216. In any event, the statement quoted is to be understood in the light of the compulsory conversion rule.

Regarding the obligations of the drawer of a dishonored bill of exchange to compensate the payee for damages originating in the depreciation of the payee's domestic currency, see *supra*, p. 343, n. 11.

15. *Reichsgericht*, Sept. 24, 1924, *R.G.Z.* 109, 16, 20; Ital. Cass., March 6, 1926, *Foro Italiano*, 1926 I 529; Nov. 20, 1929, *ibid.*, 1930 I 18; July 20, 1936, *ibid.*, 1936 I 1118. After much vacillation, the Belgian Court of Cassation took the same stand in the judgments of Jan. 17, 1929, *Revue de Droit Maritime Comparé* XXIII (1931) 91 and of Feb. 26, 1931, *ibid.* XXV (1932) 75. The vicissitudes of the Belgian rulings and the inconclusive French development in this matter are carefully discussed in the annotations to the Belgian decisions.

On damages granted to foreign creditors for delayed payment of depreciating money, see *supra*, p. 185, n. 62.

16. Judgment of June 30, 1925, *R.G.Z.* 111, 183.

17. *Supra*, p. 255, n. 42.

18. 22 & 23 Geo. V, c. 36, sec. 1(5).

19. Martens, *Nouveau Recueil* XIII (2d Series) 447, Art. 39.

by most of the continental countries and concerned, *inter alia*, with goods lost or damaged in international railway transportation. Under the treaty the weight of authority is in favor of assessing the value of the goods, which is the measure of damages, in the currency of the place, and at the time of delivery to the railway; the amount so ascertained is to be paid by the railway in its national currency at the rate prevailing at the time of payment.[20] Consequently, if the "money of damages" had depreciated earlier, the loss must be sustained by the consignor, whereas the railway has to bear the risk of a depreciation of its national currency. This solution, confirmed in 1924 by the revised Convention,[21] can hardly be regarded as of general significance since the liability of the railway carrier is very definitely fixed and restricted by the Convention (in accord with most national legislations).

II. Foreign Currency Incidental to Agency Relationships

Foreign currency is not infrequently incidental to agency and similar relationships, for instance, where the agent has collected or expended money in foreign currency. In times of fluctuating monetary values, such an occurrence may lead to grave controversies between principal and agent.[22] In deciding them—particularly in commercial cases—one has to look at the manner in which the parties have previously treated foreign money items in their accounts and elsewhere. Where the financial transactions of the parties were conducted on the basis of an account, kept by one party with the express or tacit consent of the other, the currency used in this account should be considered as the money of contract,[23] and the method of conversion once agreed upon as

20. See *Reichsgericht*, Nov. 17, 1923, *J.W.* 1924, 1362; Sept. 24, 1924, *R.G.Z.* 109, 16 at 20; Austrian Supreme Court, June 15, 1921, *Rechtsprechung* IV (1921) 68; *contra*, Cass. Rome, Feb. 11, 1922, *Foro delle Nuove Provincie*, 1922 I 168; Austrian Supreme Court, July 13, 1921, *Rechtsprechung* IV (1921) 69; June 13, 1922, *Entscheidungen des Obersten Gerichtshofs in Zivilsachen* IV no. 152. Further references in Travers, *Le Droit Commercial International* V, 2 (1933) secs. 5522-5524. See also *Reichsgericht*, June 9, 1926, *J.W.* 1927, 1102.

21. League of Nations, *Treaty Series* LXXVII 367, Art. 29. For literary and other data see Oppenheim, *International Law*, I (6th ed., 1948 by Lauterpacht) 884 ns. 17 and 18.

22. See Bequignon, *supra*, n. 1, at 35.

As to the impact of foreign elements upon commissions and similar rights of the agent, *supra*, p. 380, n. 13.

23. It is in this sense that the House of Lords held a Turkish bank liable for a sterling payment because the bank had constituted itself a sterling debtor. *Ottoman Bank* v. *Jebara*, [1928] A.C. 269 (1928).

to foreign currency items should ordinarily be followed in later cases. If, for instance, the German agent of a French principal by agreement conducted the account in terms of French francs, he could not be expected to establish an extra pound account in case he received pounds sterling for his principal; normally he had to credit the principal on the franc account at the rate of exchange on the day of receipt.[24]

Where circumstances do not warrant the theory of a tacit agreement, the agent, as a matter of course, must turn over to the principal in the original currency, foreign money received on the principal's behalf.[25] A loss through depreciation of the foreign currency would fall upon the principal [26] who would profit correspondingly from its appreciation. On the other hand the agent has been held entitled to recoup his foreign expenses in the foreign currency,[27] but the tendency has grown to grant the agent

24. The *Reichsgericht*, May 6, 1933, *Warneyers Rechtsprechung* 1933, 226, held to the contrary, owing to strong indications of such an intent of the parties.

25. *Nickerson* v. *Soesman*, 98 Mass. 364 (1867); Cass., March 9, 1925, *D.H.* 1925, 237; App. Brussels, Jan. 25, 1925. *Jurisprudence du Port d'Anvers* 1925, 64; Trib. comm. Brussels, Jan. 18, 1927, *Jurisprudence Commerciale de Bruxelles* 1927, 5 [in the latter two cases Belgian banks had converted, apparently for speculations of their own, dollars and pounds respectively, which they had received on behalf of clients; but see the French case *infra*, n. 29]. Of course, it is not necessary to transfer to the principal the very coins and notes received. *Greichsgericht*, Oct. 28, 1932, *R.G.Z.* 138, 252, 257, discussing monetary conditions within the United States. The "local-payment rule," *supra*, p. 360, is incompatible with the principal's right to obtain the currency type collected by the agent, but was recognized in this situation by the *Reichsgericht*, Oct. 22, 1924, *R.G.Z.* 109, 85, 89. Under French law, if France is the place of payment, the agent may (or must?) discharge his obligation by paying French francs at the rate of the day of payment, provided there is no delay. App. Paris, Jan. 29, 1923, *D.P.* 1923, II 129.

A situation analogous to agency relationships arose when, after the outbreak of World War I, German ships then on voyage had to be sold together with their cargo by their shippers in neutral ports. As the proceeds were paid in the currency of the port, this led to conversion problems which resulted in heavy litigation between shippers and consignors. App. Hamburg, judgments of March 16, 1921, *Hanseatische Gerichtszeitung*, 1921, 133; June 13, 1921, *ibid.*, 1921, 201 n. 105; Feb. 6, 1923, *ibid.*, 1923, 154; Feb. 26, 1923, *ibid.*, 1923, 101; May 2, 1923, *ibid.*, 1923, 157.

26. *Re Pearce*, 15 *Australian Digest 1825-1933* 779 (Fed.Ct. of Bankruptcy, 1933); Cass., Feb. 17 (13?) 1937, *J.D.Int.* 1937, 766.

27. *Reichsgericht*, May 8, 1922, *Leipziger Zeitschrift*, 1922, 512. The right to recoup foreign currency was even granted to inland residents, especially to inland forwarding agents who had incurred expenses in their national money for the purchase of foreign money on

only the equivalent in the *moneta fori* of his disbursements in foreign money, especially where the place of payment is situated within the jurisdiction of the forum.[28]

Under monetary conditions as have developed since 1931, the rules discussed must be greatly modified. Owing to exchange restrictions or to financial uncertainties banks are no longer permitted or willing to conduct accounts in foreign currency. An agent receiving foreign currency on behalf of his principal has generally to convert it into domestic money.[29]

III. Miscellaneous Non-Contract Situations Involving Foreign Currency

Damages and obligations flowing from agency relationships or agency-like relationships are the major instances of unliquidated debts in which foreign-currency problems appear. Occa-

behalf of their inland customers. *Reichsgericht*, March 17, 1924, *J.W.* 1924, 1590; April 28, 1924, *ibid.* 1924, 1593; Oct. 22, 1924, *R.G.Z.* 109, 85; Supreme Court of Austria, April 26, 1921, *Rechtsprechung* IV (1921) 71; Nov. 21, 1922, *ibid.* V (1923) 139; April 9, 1924, *ibid.* VI (1924) 251. The "local-payment rule" is inappropriate in this respect also; contrary, however, Supreme Court of Austria, Nov. 21, 1922, *supra*. Ascarelli, *Saggi Giuridici* (1949) 381, reaches, in part, different conclusions on the basis of the theory that the obligation to refund expenses is a *diritto di valore* (see *supra*, p. 180, n. 45) in terms of purchasing power.

28. Cass., *supra*, n. 26; *Reichsgericht*, Jan. 27, 1928, *R.G.Z.* 120, 76, 81. Belgian courts have followed the same line irrespective of the place of payment. The rate of the day of payment was held controlling by App. Ghent, March 31, 1927, *La Belgique Judiciaire* 1928, 82; but when the foreign currency (pounds) had depreciated relatively to the Belgian currency, the agent was allowed the rate of the day when he had expended the money. Trib. comm. Antwerp, Oct. 26, 1931 and April 19, 1932, *Jurisprudence du Port d'Anvers* 1931, 325, and 1932, 129. This seems to be the proper view. Expenses incurred by a charterer on behalf of the shipowner were under the common law rule of judicial conversion assessed as of the date when the expenses were made. *Sovereign Shipping Co.* v. *Chemin de Fer du Midi*, 18 Lloyds L.Rep. 365 (K.B. 1924).

29. The mere prohibition against contracting in foreign currency should not be deemed to stand in the way of bona fide claims for foreign currency, derived from *agency* relationships. The contrary was held by the French *Cour de Cassation* in a case where a banker had received pounds and dollars abroad on behalf of a customer. The banker was held liable to make payment only in francs, the dollars and pounds being assessed at the time of their collection, although he seems to have kept the foreign money for himself, abusing the confidence of the plaintiff. Judgment of Jan. 14, 1928, *J.D.Int.* 1928, 691, with critical annotation by Professor Perroud. Compare the Belgian cases, *supra*, n. 28.

sionally they develop in other situations also.[30] Thus courts have sometimes been concerned with the refund of payments which had depreciated in the hands of the payee or had been converted by him into another currency, the payor claiming refund of the full value furnished by him to the payee because the payment was not owed. Under Anglo-American law the breach-day rule will probably be used in such cases so that the amount to be refunded will be assessed in the currency of the forum at the rate of the day on which the payee should have reimbursed the payor.[31]

Leaving aside the rigid conversion rule one should first try to find out if under the circumstances there is conduct from which a tacit guaranty by one party to the other against changes in the monetary value may be implied. For example, a Swiss firm having sold goods to a German for Swiss francs, directed the buyer to remit to the firm's bank the equivalent in marks which soon depreciated. When Swiss authorities refused the license required for the export of the goods, the German rescinded the contract. The Swiss Federal Tribunal held the Swiss firm liable to refund the francs contracted for on the ground that the Swiss firm by its conduct had assumed the risk of the fluctuations of the mark.[32] Where there is no such assumption of risk the loss should ordinarily be imposed upon the party responsible for the fact which makes reimbursement necessary,[33] for instance upon the payor who by mistake made an overpayment. Where responsibility cannot be ascertained, refund should be made in the currency and in the amount received by the payee rather than in the currency of the debt which was to be discharged by the payment.[34]

30. See Bequignon, *supra*, n. 1, at 34.

31. In *Parker* v. *Hoppe*, 258 N.Y. 365, 179 N.E. 770 (1932), rubles were to be refunded by the defendant, owing to a rescission of the contract. The court did not decide whether the day of breach or the day of rescission would control, the general language of the decision being in favor of the former theory. The debt was payable in Russia, but there was no reference to Mr. Justice Holmes' day-of-judgment theory. *Supra*, p. 367. App. Brussels, Dec. 19, 1925, *Revue de Droit Maritime Comparé* XIV (1926) 159, applied the rate of the day of rescission to the conversion of the money to be refunded.

32. Judgment of July 11, 1923, *Amtliche Sammlung*, 49 II 287. Similarly, Cass., Torino, June 6, 1924, *Revue de Droit Maritime Comparé* VII (1924) 439.

33. In this sense Austrian Supreme Court, Sept. 30, 1925, *Die Rechtsprechung*, 1925, 166 no. 165; App. Aix, March 22, 1923, *Revue de Droit Maritime Comparé* II (1923) 582.

34. The question of overpayment in foreign currency or in discharge of a foreign currency debt has been dealt with, in conflicting decisions, by the Austrian Supreme Court. Where Austrian crowns were paid in discharge of a foreign currency debt, refund was to be made in crowns of the same amount accord-

In maritime general averages it is a matter of course to have one rate of exchange throughout; the date of the sacrifice has been held decisive by an English court.[35] This seems to be sound ruling.[36]

IV. Damages in International Courts

Wherever international courts are concerned with claims for damages, currency questions will arise because at least two currencies—of the creditor state and of the debtor state—will be involved. In order to ascertain the practice of international tribunals, 114 of their judgments awarding damages and rendered in the period from 1794 to 1938 have been investigated.[37] Sixty chose the creditor currency, 33 the currency of the debtor, 18 that of a third state,[38] and 3[39] put the sum due on a gold basis.

ing to the judgment of Nov. 27, 1923, *Rechtsprechung* VI (1924) 106; the amount of foreign currency to be discharged was, however, considered as refundable in the judgments of March 26, 1923, *ibid.* V (1923) 250 and Sept. 30, 1925, *Die Rechtsprechung* 1925, 166, no. 165; similarly the Supreme Court of Czechoslovakia, Nov. 21, 1923, cited by Wahle, *Rechtsprechung* VI (1924) 106. Refund of payments in foreign currency was involved in the judgments of Nov. 28, 1922, *Rechtsprechung* V (1923) 137; Jan. 8, 1924, *ibid.* VI (1924) 77; Dec. 17, 1924, *Die Rechtsprechung* 1925, 41; Oct. 21, 1925, *ibid.* 1925, 166, no. 164. It seems impossible, however, to derive a consistent line of thought from these cases.

35. *Norcuro Traders* v. *Hardy*, 16 Lloyds L.Rep. 319 (K.B.1923). *Reichsgericht*, June 4, 1924, *R.G.Z.* 108, 304, 307, mainly concerned with other questions, favors the rate of exchange of the date decisive in the distribution of the general averages. That date is not clarified in the opinion. On monetary aspects of general averages in insurance see *supra*, p. 374, n. 59.

36. Among other situations involving problems of foreign currency, those arising in the salvage of foreign ships may be mentioned. See *The Eisenach*, 54 Lloyds L.Rep. 354 (Adm.1936), *infra*, p. 482, n. 28, and App. Hamburg, June 12, 1922, *Hanseatische Gerichtszeitung* 1922, 855; Feb. 26, 1923, *ibid.*, 1923, 166; German Marine Arbitration Tribunal, May 6, 1916, *ibid.*, 1917, 97. Subrogation in case of suretyship or similar relationships is likewise in point. After World War I, the Belgian Government paid as guarantor pound debts of Belgian industrial firms to their English creditors. When the Government brought suit for reimbursement in francs, it was properly awarded the amount laid out for the pounds though the pound had since depreciated relative to the franc. Belgian Cass., March 15, 1928, Piret, *supra*, p. 373, n. 58, at 72. On a currency question connected with the restitution of a dowry given in France but transferred to Switzerland, see Court Montpelier, Nov. 15, 1944, *D.H.* 1946, 162.

37. On the basis of Stuyt, *Survey of International Arbitrations* (1939).

38. For instance, in Brazil-United States, 1870 [pounds], Stuyt #89; Colombia-Great Britain, 1899 [Swiss francs], Stuyt #201; Norway-Great Britain, 1922 [dollars], Stuyt, #339.

39. Chile-United States, 1873 [Chilean gold; the dollar was then at

(Decisions of Mixed Claims Commission, Mixed Arbitral Tribunals, etc., are not included in these figures.) The United States, Mexican Claims Commission (1927–1931), gave its judgment in terms of dollars (then on gold),[40] relying on the American-Mexican Treaty of 1923 which called for payment "in gold coin or its equivalent." The Italian-Mexican Claims Commission chose current Mexican money (silver pesos).[41]

Generally not much thought was given by the various international tribunals to the currency question. An exception is the *Wimbledon* case.[42] The allied powers, on behalf of a French freighter, brought a suit in the Permanent Court of International Justice against Germany for not having permitted the vessel which was carrying contraband to go through the Kiel Canal. The German Government took the view that a government can only be held liable to discharge its obligations in its national money. The court, however, allowed damages in French francs because French currency was "the currency of the applicant [*namely of the French freighter*] in which his financial operations and accounts are conducted, and it may therefore be said that this currency gives the exact measure of the loss to be made good." The theory is in accord with the majority of cases. In fact, compensation in the field of public international law is adequate where the claimant, that is, ordinarily the claimant state, receives it in its own currency.[43] Selection by an international tribunal of the currency of the debtor state is a rather lenient method.[44] On the other hand, it is ordinarily not commendable to saddle the debtor state with a gold (coin or value) obligation. Such an obligation —the currency matters little in this case—lays upon the debtor the consequences of a deterioration of the creditor's currency. Of

a discount], Stuyt #106; France-Venezuela, 1915 [gold bolivares], Stuyt #309; Germany-Portugal, 1930 [gold marks], Stuyt #325.

40. Feller, *The Mexican Claims Commissions, 1923-1934* (1935) 312.

41. *Ibid.* at 313.

42. Permanent Court of International Justice, Aug. 17, 1923, *Series A*, No. 1 (1923) at 32. See also *Series C*, No. 3, Addl.Vol., p. 151.

43. Characteristically, in the famous Alabama case [Stuyt #94] Great Britain was ordered to pay the United States compensation in dollars which were then at a discount.

44. The British-Mexican Claims Commission (1929-1932) held that the awards should be based on the currency of the debtor state, but this statement must be read in the light of the fact that the awards were actually given in terms of *gold* pesos rather than of current Mexican (silver and paper) money. Feller, *supra*, n. 40, at 313. The latter currency was chosen by the Permanent Court of Arbitration in the *Pious Fund* case between the United States and Mexico, G. G. Wilson, *The Hague Arbitration Cases* (1915) 10.

course, the debtor would benefit from its appreciation, but in the light of experience this chance is so slight that it is far outweighed by the menace of depreciation. In the absence of an express treaty provision to the contrary,[45] gold judgments should therefore be avoided by international tribunals. Actually, gold payments have been imposed without express authorization.[46] Uncertainty prevails with regard to the whole currency problem. If in the future international tribunals will give more attention to the question, more reliable standards may evolve.

Whatever the currency chosen for the adjudication, conversion from another currency may be required for computing the amount to be awarded. In this respect, too, available international cases offer little elucidation.[47] The Peace Treaty of Versailles and its companion treaties, prescribed that the Mixed Arbitral Tribunals instituted by the treaties, in awarding damages, had to convert German marks (or other currencies of the defeated nations) into

45. For instances see Feller, 312; Agreement between the United States and Venezuela of 1903, Art. 1(4); Wilson, *The Hague Arbitration Cases* (1915) 31; *Orinoco S. S. Co.* case between the United States and Venezuela, Protocol of Submission, Art. IX; Scott, *Hague Court Reports* (1916) 226, 238 [judgment was in plain dollars]; Agreement between France and Venezuela of Feb. 11, 1913, Art. VII, *Am.J.Int. L.* 1913, *Supp.*, 218.

46. Feller, 313, 314, and next note In 1863, the United States was held liable in an arbitral award to pay to Montano, a Peruvian citizen, $24,000 and interest in "current money." When the United States offered paper dollars (see 11 Op. Att.Gen. 52), Montano, by another award in 1869, was held entitled to a gold payment. Moore, *International Law Digest*, VII (1906), 51; cf. Moore, *International Arbitrations*, II (1898), 1638, 1645, 1649. The significance of the case lies in the fact that the phrase "current money" generally includes irredeemable paper money. *Supra*, p. 150. Nor were there provisions for gold payment in the treaties underlying the cases.

47. Feller, 313, states that the United States-Mexican Commission adopted the breach day rule, but the opinions in point are by no means clear. Cf. *Opinions of Commissioners under the Convention Concluded between the United States and Mexico* (1927) 318 [*Cook* case]; *ibid.* (1929) 121 [*Acosta* case]; *ibid.* (1929) 123 [*Singer Sewing Machine Co.* case]. See also De Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico* (1938) 272.

In the *Acosta* case it was recognized that conversion should not lead to an "unjust enrichment" of the creditor. As all of the three cases were governed by Mexican law, the Mexican Government invoked a Mexican Act ("Law of Payments") of April 13, 1918, specifying gold equivalents of obligations contracted in paper (peso) currency. Apparently this Act by its own terms, did not bear upon claims for *damages*; its application might also have run counter to treaty provisions. Again, the theory of the Commission which discarded the Act is uncertain.

the currency of the victorious power concerned, at the pre-war ratio.[48] The debtor state was thereby obligated to give compensation for the depreciation of its own currency caused by the war and its aftermath. Without special agreement no such obligation of a debtor state can be derived from international or municipal law.

Section 29

GOLD CLAUSES INTERNATIONALLY

(A) CHOICE OF LAWS

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I. The Proper Law in General

The international ramifications of gold clause abrogation [1] have been most important. This is due first, to the fact that gold

48. See, Treaty of Versailles, Part X, Art. 297, in connection with Art. 298, annex § 14(2) and Art. 296 (d). The Peace Treaty between the United States and Germany of Nov. 11, 1921, 42 Stat. 1939, U. S. Treaty Series No. 658, incorporated by reference Part X of the Versailles Treaty. Accordingly, the American German Mixed Claims Commission awarded damages in terms of United States dollars. See *Decisions of the Mixed Claims Commission, United States and Germany, passim.*

1. Literature on international aspects of gold clause abrogation: Weigert, *The Abrogation of Gold Clauses in International Loans and the Conflict of Laws* (1940); Bagge, "L'effet int. de la législation Americaine clause-or", *Revue de Droit Int. et de Législation Comp.* XVIII (1937) 457 and 786; Behrend, *Die Wirkung der Aufhebung der Goldklauseln* (thesis, Berlin, 1936); Bresch, "Obbligazioni con clausola oro o clausola valuta estera", *Foro delle Venetie,* 1934, 796; Domke, *La Clause "Dollar or"* (2d ed., 1935); Domke, "L'Influence des lois monétaires sur le droit int. privé", *Nouvelle Revue de Droit Int. Privé,* 1937, 3; Domke, "Die Amerikanische Goldklauselgesetzgebung", *Annuario di Diritto Comparato e di Studi Legislativi* XIII (1938) 209; Eckstein, *Geldschuld und Geldwert* (1932); Hamel, "L'application des lois monétaires annulant les clauses-or, et les principes des conflits des lois", *Nouvelle Revue de Droit Int. Privé,* 1937, 499; Leschallier de Lisle, *Les Notions de Paiement International et de Contrat International* (thesis, Rennes, 1936); the writer's "Comparative and international aspects of american gold clause abrogation", 44 *Yale L.J.* 53 (1934); Rabel, "Gold-dollar-Anleihen und Vereinbarungen des New-Yorker Rechts", *Z.A.I.P.* 1936, 442; Sauser-Hall, "La clause-or dans les contrats publics et privés", *Rec.Ac.* LX (1937) 653; J. Reiss, *Portée Internationale des Lois Interdisant la Clause-Or* (1936).

clauses were employed in international financing no less than in domestic, and secondly, to the divergent attitude of the several countries, with regard to gold clause abrogation. The controversies center primarily on the American Joint Resolution which became a matter of concern even in entirely European transactions through the universal use of the "gold-dollar" device. A broad international and legal discussion arose from these developments, involving problems of extraordinary complexity and challenging deeply rooted principles of law and financing.

The first and paramount question in international gold clause cases is that of the applicable legal system. Despite the objections of a number of writers, the courts of the various countries tend to apply the law designated by the parties in their contract, or if there is no such stipulation, to imply the intention of the parties from the data and the surrounding circumstances of the contract. Roughly speaking the court will examine the various territorial contacts of the agreement in order to determine the area in which the most important contacts are situated; the law of that territory will be applied on the theory that such application conforms with the probable intention of the parties (or perhaps on an "objective" theory, regardless of such presumable intention).[2] In numerous cases the gold clause situation has been plain in this respect. Almost all of the gold dollar bonds floated after World War I by foreign debtors in the United States are uncontestedly subject to American law. Usually the bonds carry provisions of the following type: "This agreement shall be deemed to be a New York contract and all rights arising thereunder shall be interpreted and performance thereof shall be governed in accordance with the laws of the State of New York in the United States and enforced accordingly." Federal law, of course, is by natural implication included in the law of the State of New York.[3] Where the text is not so sweeping or where the bond contains no such clause, the result still will be the same. The bonds in question are drawn like regular American bonds;

Pertinent materials were collected periodically in *Bulletin de l'Institut Juridique International* and *Zeitschrift fuer Auslaendisches und Internationales Privatrecht.* Virtually only those materials favoring the maintenance of the gold clause —omitting the cases to the contrary—are compiled in Plesch, *The Gold Clause* (2d ed., 1936), vols. I and II; Plesch, *Recueil d'Arrêts et de Consultations sur la Clause-Or* (1937).

2. Cf. this writer's *Principles of Private International Law* (1943) 160.

3. *Reichsgericht*, May 28, 1936, *J.W.* 1936, 2058; App. The Hague, Jan. 14, 1935, *Nederlandsche Jurisprudentie* 1935, 119; App. Brussels, Feb. 4, 1936, *Pasicrisie Belge* 1936 II 52, 54.

they are phrased in English; stated in terms of gold dollars payable in the United States; they provide for an American "fiscal agent;" they are designated to be listed on the New York Stock Exchange and to meet the requirements thereof, and so on. Leaving aside, for the moment, the special problems of government debts and of public policy (*ordre public*) of the forum, it can be said that every court, American or foreign, will apply American law to such loans.[4]

Attempts have sometimes been made to preclude the application of gold clause abrogation on the ground that the abrogation was retroactive in character or could not have been anticipated by the parties when they made the contract. These attempts have been rejected by the courts[5] and properly so. Where the parties place their contract under a definite legal system, say the American, they submit to a changeable body of rules which necessarily develops independently of their wishes or expectations. Legislative encroachment upon pending contracts during periods of emergency is common enough, especially in the monetary field. Bodin's and Pardessus' notion that a creditor is not bound by foreign infringement of his right[6] has not more than

4. This is indicated by the cases discussed under III of this section (public policy). American law was also applied by the Court Copenhagen, Feb. 3, 1934, in *Soderberg* v. *Telephone Company of Copenhagen*, affirmed without opinion by the Supreme Court of Denmark, Dec. 14, 1934, *Z.A.I.P.* 1935, 280 [loan exclusively placed in the United States, principal and interest payable in dollars in New York, the Guaranty Trust Company being "fiscal agent"]; and by the Courts of Torino and of Naples in the cases cited *infra*, p. 429, n. 59. Only App. Paris, April 24, 1940, *Revue Critique de Droit International* 1946, 82, in the case of the Canadian loan of the steamship company, Messageries Maritimes (*Société des Services Contractuels des Messageries Maritimes*) denied the application of Canadian law (and Canadian gold clause abrogation) despite the typical Canadian (American) set-up of the bond, solely on the ground that the Messageries Maritimes was legally a French corporation. *Contra:* annotation by Niboyet.

5. *Reichsgericht* and App. Brussels cited in n. 3; App. Düsseldorf, Sept. 26, 1934, *Die Deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts, 1934*, p. 300 and App. Cologne, Sept. 13, 1935, *J. W.* 1936, 203 [loan of the city of Saarbruecken]. Contra: an ancillary argument used by the Supreme Court of the former Saar Territory, Dec. 21, 1934, *Z.A.I.P.* 1935, 275. In the great majority of cases, retroactivity was not objected to. Contra: House of Lords in the *New Brunswick* case, *infra*, p. 417, n. 7, and, interpreting the intent of the parties, Supreme Court of the Saar Territory, Sept. 13, 1935, *Z.A.I.P.* 1935, 275 (loan of the City of Saarbruecken).

The extravagant retroactivity of the German revaluation law of 1925 led to a different result. *Supra*, p. 359.

6. *Supra*, p. 349.

faintly colored the discussion of modern gold clause abrogation, and where it appeared it failed in the courts.[7]

Doubts are more serious where the connection of the gold obligation with a given country is not so unambiguous as it is in the case of a typical New York bond. As has happened so often, the place-of-payment, or to put it more broadly, the place-of-performance theory, has been instrumental in confusing courts and lawyers. The law of the place of performance, it was seen, is universally held to control the "manner of performance" of a contract.[8] "Manner of performance" stands in contradiction to the "substance" of the obligation, which may be controlled by a legal system different from that of the place of performance. The question then arises: Does the gold clause bear upon the "manner of performance," *i.e.*, does the gold clause only regulate the medium of payment? The answer will depend upon the prevailing construction of the gold clause. The gold coin clause, *as such*, perhaps concerns only the medium of payment. The gold value clause, however, clearly bears upon the amount, therefore upon the substance of the debt, since certainly nothing in a debt is more "substantial" than the amount to be paid. Only under the "Tantalus" interpretation of the gold coin clause can the value clause which the coin clause implies, be discarded and the decision on the validity of the clause as a whole be based on the place-of-performance theory. In other words, the place of performance is not a useful criterion for solving the problem at hand.

These points are important in appraising the celebrated cases of the *Serbian and Brazilian loans*, decided in July, 1929 by the Permanent Court of International Justice.[9] The bonds had been

7. The existence of a preferential right in a foreign creditor was squarely negatived in *Bethlehem Steel Co.* v. *Zurich General Accident & Liability Ins. Co.*, 307 U.S. 265, 59 S.Ct. 856, 83 L.Ed. 1280 (1939) and in *Hartmann* v. *U. S.*, 65 F.Supp. 397 (Ct.Cl.1946). [In both cases the plaintiffs were Swiss.] Generally, the courts took the same view as a matter of course. The opposite theory was successfully used by Switzerland against Germany in 1920, *infra*, p. 444.

In *New Brunswick Ry. Co.* v. *British and French Trust Corp., Ltd.*, [1939] A.C. 1 (H. of L., 1938), Lord Maugham, L.C., in discarding Canadian statutory gold clause abrogation, used the argument (at p. 24) that such a statute cannot "diminish or destroy the rights of an English creditor . . . after he has commenced an action in this country." This is a different and *procedural* theory. As such it was convincingly refuted by Lord Wright, *ibid.* at 33.

8. *Supra*, p. 376.

9. Permanent Court of International Justice, *Ser. A*, No. 20/21, Judgment No. 14; *J.D.Int.* 1929, 977. On the jurisdictional aspects of the cases see *infra*, p. 428.

issued before World War I; they were payable in gold francs in Paris and in other currencies in several places outside of France. When the franc depreciated, the debtor governments paid the bondholders only the nominal amounts of the coupons. Apart from the fact that they contested the existence of gold clauses in certain of the bonds, they maintained that the gold clauses were ineffective because of the *cours forcé* of the French francs. On a suit brought by the French Government against the debtor governments, in the interest of French bondholders, the Court held that the defendants had to pay the gold value of the francs promised. It pointed out that "the money in which the payment must or may be made *in France* depends on French law" (italics the writer's). Applying the French doctrine of "international contracts" the Court, consequently, held the gold clause valid. It was expressly stated that the "substance of the debt" was controlled by Serbian and Brazilian law, respectively. The defendants had not in terms alleged that gold clauses were invalidated by their domestic laws.[10]

Neither the Court's statement of the defendants' legal theories, nor its brief account of its own theory, are clear. The Court seems to apply a place-of-performance theory, relying on the fact that the bonds were payable in Paris and in the money there current. No other explanation is consistent with the Court's conclusion as to the applicable law.[11] Of course the place-of-payment theory is particularly inappropriate in a case where the Court rejects at length the Tantalus interpretation of the gold clause and gives judgment for the gold *value*.

10. See p. 427.

11. The same view is taken by App. Amsterdam, June 30, 1938, *Nederlandsche Jurisprudentie* 1939, 1225, 1229 and by Reiss, *supra*, n. 1, at 120. However, Sauser-Hall, *supra* n. 1, at 753, though an opponent of the place-of-payment theory, rejects it. According to him, the defendant governments did not demand the annulment of the gold clause because of any provision of Serbian or Brazilian law requiring it; they merely claimed to be entitled to make payment in French paper francs. The court, once it had concluded that the parties had contemplated gold francs as defined in the French law of 1803, had only to decide what should be the mode of payment. Since payment was demanded in France, the court properly held it could be made in paper francs on the basis of the gold value. This, at least, seems to be Professor Sauser-Hall's point of view, which, unfortunately, is difficult to grasp from his argument.

Professor Sauser-Hall thus apparently assumes that the issue was whether the defendants were to pay gold or paper. Yet the real issue was how much the defendants had to pay. It is true that they had claimed the right to make payment in French paper francs, but this was to be understood in the light of the "franc-for-franc" conception. Where they had promised to pay

There is still another objection to the opinion of the Permanent Court. The coupons of the Serbian bonds were worded as follows: "4½% gold loan, 1906 . . . Coupon payable . . . in Belgrade, Paris, Brussels and Geneva, for 11.25 fr.; in Berlin, Vienna, Amsterdam at the rate of exchange at Paris." At the time of the issuance of the loans Serbia, France, Belgium, and Switzerland—the three latter members of the Latin Monetary Union—had adopted the "franc" as their monetary unit. They were, by the terms of the coupon, coordinated as "places of payment". The fact that payments demanded by the holder in Berlin, Vienna, Amsterdam (rather than in Belgrade, Brussels, and Geneva) were to be made according to the rate of exchange on Paris is not a sufficient reason for considering Paris as the place of payment rather than Brussels or Geneva and particularly Belgrade. The Court refrains from giving a reason for favoring Paris. Even if the place-of-payment theory be adopted it would be sound doctrine to limit it to a situation where there is a single place of payment. Where several coordinated places of payment situated in different countries are provided, the "contacts" thereby created neutralize each other.[12]

The decision of the Permanent Court has been cited, without much discernment, by many courts, partly as authority against the "Tantalus" interpretation,[13] partly for what the decision does not say.[14] For its Conflicts-of-Law doctrine it was referred to by

1,000 gold francs, they offered, in view of the *cours forcé* of the franc, 1,000 paper francs. It is perfectly obvious from the opinion and the pleadings that this was the view of the defendants. They might have derived their *cours forcé* defense from the French law or they might have considered it as self-evident and conclusive under any law (which would have been in accord with the French conception). Part of the court's language suggests that the defendants had by their pleadings placed their defense on the ground of French law. But if that had been the case, the court would not have advanced an independent line of reasoning and conclusion concerning the applicability of French law. And nowhere did the court state that the validity of the gold clause resulted from Serbian or Brazilian law. Niboyet, "La rôle de la justice internationale en droit international privé," *Rec.Ac.* XL (1932) 206, 208, likewise assumes that the judgment apparently without considering the intent of the parties, is based on a place-of-performance theory. One would have liked, as Professor Niboyet rightly remarks, *"une déclaration un peu plus firme et plus nette"* on the part of the Court.

12. See Batiffol, *Les Conflits de Lois en Matière de contracts* (1938) # 89/90.

13. Thus by the House of Lords in the *Feist* case, [1934] A.C. 161, 173 (1933).

14. The Mixed Court Cairo, Feb. 16, 1933, *J.D.Int.* 1933, 438, 445, believed that the Permanent Court had "rallied" to the theory of the French courts. Similarly, Court

the *Reichsgericht* in the case of the Vienna loan of 1902. The Vienna bonds provided for the payment of: "500 crowns=425 marks payable in Berlin=525 francs payable in Paris, Brussels or Basle=100 U. S. A. gold dollars payable in New York." An Austrian statute of January 27, 1922, authorized the city of Vienna to discharge the bonds by paying the bondholders the amount of Austrian currency as stated in the bonds, in Austrian crowns. The effect was to deprive the bondholders of their rights, as the Austrian crown had depreciated nearly to zero. A bondholder brought suit in Germany against the city of Vienna for payment, in Zurich, of the full amount of Swiss francs, as indicated in the bonds. He did not avail himself of the dollar gold-clause, but the situation was similar to a gold-clause case. The *Reichsgericht* held for the claimant.[15] It followed the Permanent Court in that it admitted the substance of the debt to be subject to the domestic law of the issuer (Austria) while "performance", as chosen by the plaintiff, namely payment in Zurich, would be governed by Swiss law. Thus the Austrian law of 1922 was eliminated. However, the Court was not only mistaken in assuming that it was confronted with a question of "performance" rather than one involving the substance of the debt; it was also wrong in making the choice of law dependent on the place of payment the plaintiff should *elect*. On that theory the bondholder would be entitled arbitrarily to change the law applicable in subsequent payments, and before the first election the bond or coupon would be under no law, a homeless wanderer. This is bad law.[16]

Torino, July 7, 1934, *Foro Italiano* 1934 I 1351. An accurate interpretation of the decision of the Permanent Court is presented by the App. Brussels *supra*, n. 3.

In the Gold Clause cases, Mr. Justice McReynolds, dissenting, 294 U.S. 363, 55 S.Ct. 420 gives the impression that the judgment of the Permanent Court, is authority for the minority view. There is no basis for that assertion, *supra*, p. 290, n. 42.

15. Judgment of Nov. 14, 1929, *R.G.Z.* 126, 196.

16. The theory objected to has also been used in the Canadian case of *Corporation des Obligations Municipales Limitée* v. *Ville de Montréal Nord*, 59 *Rapports Judiciares Québec, Cour Sup.* 550 (Superior Ct., 1921), *supra*, p. 394, n. 32; by the Swiss Federal Tribunal, May 23, 1928, *Amtliche Sammlung* 54 II 257, *J.D.Int.* 1929, 497, 500. Similarly, though less distinctly, *Reichsgericht*, Sept. 30, 1920, *R.G.Z.* 100, 79; *Lann* v. *United Steelworks*, 166 Misc. 465, 1 N.Y.S.2d 951. The theory of the *Reichsgericht* was referred to in *Pan-American Securities Corp.* v. *Friedrich Krupp A.G.*, 169 Misc. 445, 6 N.Y.S.2d 993 (1938), applying German law.

The existence of several coordinate places of payment or collection was disregarded by the *Reichsgericht*, April 27, 1895, *J.W.* 1895, 302, in the determination of the legal system applicable, a decision not cited in the later cases. The correct view was also taken by the Swiss

Independently of this continental development, the English Court of Appeal announced a similar theory in *British and French Trust Corporation Ltd.* v. *New Brunswick Ry. Co.*[17] In 1884 the company had issued bonds in terms "£ . . . sterling gold coin of Great Britain of the present weight and fineness" and payable, at the option of the holder, in London or in New Brunswick. The Court while admitting that the bonds were governed by Canadian law, discarded the Canadian gold clause abrogation of 1937 and upheld the gold clause under English law, which was the law of the place of payment. The Court did not discuss the fact that the bonds were also payable in New Brunswick, an omission strangely similar to that of the Permanent Court. As to London-payment, the Court was bound to recognize, under the *Feist* case, that a gold value clause had to be read into the contract. The rule under which the "*mode* of performance" is determined by the *lex loci solutionis* was therefore unworkable. Instead the Court advanced the theory that the "measure" of performance is also governed by that law.[18] But that vague term in reality means the amount of the debt which is governed by the "proper law of the contract." This was Canadian law as recognized by the court. Under the Canadian Act each gold clause obligation "governed by the law of Canada" was abrogated, the Act explicitly referring to gold debts payable *outside Canada* and in *non-Canadian currency*. Quaere: how could the defendant, a Canadian railway having promised to pay pounds sterling in London, be deemed to be outside the terms of this unmistakable Canadian Act?

Federal Tribunal, April 17, 1916, *Amtliche Sammlung* 42 II 179; Sept. 26, 1933, *ibid.* 59 II 355, approvingly citing this writer; and Sept. 18, 1934, *ibid.* 60 II 294. App. Hamburg, May 16, 1929, *Hanseatische Rechts-und Gerichtszeitschrift*, 1930 B 743, inveighs against the conception of a "transportable" place of performance.

17. [1937] 4 All.E.R. 516 (C.A.).

18. To this extent the court relied primarily on the language, inaccurately summarized, rather than on the holding of *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*, [1934] A.C. 122 (H. of L. 1933), *supra*, p. 377, n. 4. *Ralli Brothers* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (C.A.1920), likewise referred to by the court, was not in point. Freight, on an English contract, was payable in Barcelona. A supervening Spanish maximum-freight statute was held applicable because its non-observation would have been punishable. In the *New Brunswick* case there was, however, no prohibition to pay the gold amount. The confusing term "measure of performance" was also used, though with no injury to the result, in *Auckland Corp.* v. *Alliance Assurance Co., Ltd.*, [1937] A.C. 587 (P.r.C.), *supra*, p. 395, n. 35, In the *Feist* case, Lord Russell of Killowen correctly found in the gold clause a reference to the measure of the debtor's *obligation* [1934] A.C. 161, 172.

On further appeal the House of Lords [19] discarding the Canadian statute for other reasons, shunned the Court of Appeal's place-of-performance theory. In fact, before the decision of the Court of Appeal, the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Co. Ltd.*,[20] had kept clear of that theory. The Council, a New Zealand Board, having issued bonds payable in Melbourne, invoked in its favor a Victoria statute which reduced interest. Despite the Victoria place of payment the Council was held liable for full interest. The court pointed out that the substantial contacts of the bonds were preponderantly with New Zealand. The law of New Zealand rather than of the place of payment was therefore held to determine the amount due. The parallel to the gold clause situation is obvious.

Even less sound than the place-of-payment rule is the theory that the validity of a gold clause depends on the law of the currency contracted for. It is the very objective of the gold clause to eliminate the fluctuations of the currency contracted for. Under these circumstances, the currency chosen has no more than a quite secondary and technical significance—a significance far too weak to offer a crucial test in the Conflict of Laws. Though politically and constitutionally gold clause abrogation may be primarily a monetary measure, the individual gold clause, considered from the viewpoint of Conflict-of-Laws doctrine, presents a different aspect. Indeed, it is now a well-settled rule that the validity of the clause does not depend on the "law of the currency." [21] The Swiss Federal Tribunal explicitly rejected the law-

19. [1939] A.C. 1 (1938), *infra*, p. 437.

20. [1938] A.C. 224 (1937). We do not dwell on the strained attempts of the Court of Appeal in the *New Brunswick* case to reconcile its decision with the *Mount Albert* case.

21. The only exception seems to be the Austrian Supreme Court, judgment dated March 12, 1930, *Die Rechtsprechung* 1930, 105. An Austrian property owner mortgaged his estate to a German life insurance company for a debt expressed in gold marks. The liability of the owner was clearly governed by Austrian law since in the case of a real estate mortgage the personal liability should be deemed to be under the same law as is the mortgage. Furthermore, the contract was made in Vienna. Still the court held the gold clause vitiated by the German ordinance of Sept. 28, 1914, abrogating the gold clauses. This reasoning, however, was auxiliary; the decision rests primarily on different grounds. The proper theory had been set forth by the same court on Feb. 12, 1929, *Die Rechtsprechung*, 1929, 105. An Austrian insurance company in 1906 made an insurance contract with an Austrian resident in terms of German gold marks payable in Vienna. After the war the company tried to avail itself of the German ordinance of 1914. The court held that the defense was

of-currency theory.[22] The Supreme Court of Denmark, at a time when gold clauses were held ineffective under English law,[23] deemed valid the gold clause of a contract made between a Norwegian shipping company and a Danish stockyard for payment in Copenhagen of English pounds "in gold."[24] And obviously, application of the American Joint Resolution is out of the question in respect to "gold dollar" stipulations to be found in numerous German or Austrian or other European contracts of a wholly local character.[25]

In the writer's opinion, the law of the country in which the contract has its most important contacts, and which is therefore controlling as to the "substance" of the debt should also govern the decision as to the validity of gold clauses.[26] This theory underlies the *Mount Albert* case, the cases which were above considered as unquestionable,[27] as well as the great majority of the cases regarding governmental loans, which will be discussed presently.

not good, and that the debt was exclusively governed by Austrian law, the closest connections of the contract evidently leading to Austria. See also judgment of Oct. 9, 1930, *Die Rechtsprechung* 1931, 11. As to the important opinion of the Great Senate *(Plenarsenat)* of the court regarding the American branches of the Australian League of Nations and International Federal Loans, see *infra*, p. 426. Belgian Cass., Feb. 24, 1938, *Bull.I.I.* XXXIX (1938) 105, 107, has somewhat the aura of applying the law-of-currency theory, but in reality rests on a law-of-contract doctrine.

Retaliatory legislation adopting currency as a criterion, *infra*, p. 441, is a different matter. Still less has the law-of-the-currency theory been espoused by writers. See the survey by Frölicher, *Das Währungsstatut im Internationalen Privatrecht* (Berne, 1941) 65. Weigert, *supra*, n. 1, is an exception.

22. Swiss Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung* 64 II 88, 94, citing this writer.

23. Namely, in the interval between the Court of Appeal and the House of Lords decision in the *Feist* case, *supra*, p. 274, ns. 64 and 65.

24. Judgment of June 21, 1933, *Z.A. I.P.* 1933, 960.

25. Thus explicitly *Reichsgericht*, Nov. 12, 1934, *J.W.* 1935, 189; same date *Bank-Archiv* XXXIV (1935) 163; *Reichsfinanzhof* (highest German taxation court), Jan. 21, 1937, *Bank-Archiv* XXXVI (1937) 329; and with regard to gold dollar stipulations in entirely Hungarian contracts, Supreme Court of Hungary in several cases listed, without indication of dates, in *Z.A.I.P.* 1937, 685.

26. There is more on this point in the writer's *Principles of Private International Law* (1943) 172.

27. *Supra*, p. 416. See also *Kricorian* v. *Ottoman Bank*, 48 T.L.R. 247 (K.B.1932) [account of a Turkish national with a Turkish bank; place of payment (probably Smyrna) not referred to by the court; gold clause abrogation under Turkish law held applicable].

II. Government Bonds

Government bonds, which frequently contain gold clauses, present a special problem from the point of view of Conflict-of-Laws.[28] Despite controversies among legal writers,[29] it is generally assumed that such bonds are governed by common law, or in continental terminology by "private law" rather than by international public law.[30] At the same time, a sovereign state (or a subdivision thereof) in dealing with private persons is, according to a traditional rule, supposed to stand on its own law.[31] One admits that a state may voluntarily submit to another law; but under the traditional rule this qualification has little significance. The traditional theory was used by the *Permanent Court* in the case of the Serbian and Brazilian loans and by the *Reichsgericht* in the case of the Vienna loan, although eventually both courts in a roundabout way applied a legal system other than that of the debtor state.

More recently, however, the traditional rule itself has been broken down as a result of the gold clause controversies. The English case *The King* v. *International Trustee for the Protection of Bondholders A.G.* is a land-mark. In 1917, Great Britain, through the banking house of Morgan and Co., had floated a 5½ per cent loan of 250 million gold dollars in the United States. The bonds were registrable in New York and generally drawn in the American manner; payment was to be made, however, at the option of the holder, either in New York, in gold dollars, or in London, in pounds sterling at the fixed rate of $4.86½ to the pound. The King's Bench, in a suit brought for the gold dollar amount by the holder of a bond against the British Government tried to protect the government by a resolute use of the "Tantalus interpretation". This the Court of Appeals was unable to permit. Deciding, under the traditional rule, for the application of the English

28. Mann, "The law governing state contracts," *Brit. Y.B. Int. L.* 11 (1944); Schmitthoff, "The international government loan," Journ. Comp. Leg. and Int. L. XIX 179 (1937); Note, 46 Yale L.J. 891 (1937); Domke, "Des emprunts d'Etats libellés en dollars-or," J.D. *Int.* 1936, 547.

29. Borchard, "International loans, and international law", 26 *American Society of Int. Law, Proceedings* 134, 143 (1932).

30. See *Murray* v. *Charleston*, 96 U. S. 432, 445, 24 L.Ed. 760 (1877), and further decisions quoted by King, "The Gold Clause: can it constitutionally be abrogated by legislation", 2 Geo. Wash. L.R. 131, 149, (1934); Feilchenfeld, *Public Debts and State Succession* (1931) 650; Sack, "The juridical nature of the public debts of States", 10 N.Y.U.L. Q.Rev. 127, 341 (1932–33). See, however, *infra*, n. 46.

31. Cf. International Trustee etc. v. The King, 52 T.L.R. 82 (K.B., 1935).

law, it gave judgment for the plaintiffs,[32] setting another example of judicial straightforwardness in a very tempting situation. The House of Lords unanimously [33] reversed this decision. It held that the English Government had submitted to American law and was therefore entitled to rely on the Joint Resolution. The House of Lords reduced the traditional theory to a standard to be overcome by any counter-indications derived from the circumstances of the case.

The tenet is certainly warranted. Nor can one find fault with the court's view that the main contacts of the bonds were American—in the picture of the whole the English contacts (issuance by the English government; London an alternative place of payment) evidently carried little weight by comparison. Still, approval of the opinion is subject to serious reservation. The loan was originally made through short-term "notes" to be exchanged at the option of the holder for the bonds at bar. The notes were secured by a large pledge of securities deposited by the English Government with the Bankers Trust Company in New York, on behalf of the noteholders. The pledge agreement provided for a "judicial" sale and contained certain additional clauses apparently relating to American law. It was upon these pledge-clauses that the House of Lords mainly relied for the application of American law. It is, to be sure, well-settled law, in England and elsewhere, that the rights of a pledgee are determined by the *lex rei sitae.*[34] Still the law of the pledge is not, however, the law of the contract.[35] Nor would a pledge (or mortgage) defined in terms of gold permit an inference as to the gold character of the *debt,*[36] not to speak of the distinctly ancillary nature of the clauses relied on by the court. And, most important, the pledge was given to secure the *notes.* It did not secure the bonds, the holders of which were unable to learn from the text of the bond that there had formerly been a pledge. The law of negotiable instruments does not permit an interpretation vitally affecting the rights of the bondholders to be based on circumstances entirely outside the bond.[37]

32. [1937] A.C. 500, 505 (1936).

33. [1937] A.C. 500 (1937).

34. See, *e.g.*, Beale, *Conflict of Laws* II (1935) 1008; *Inglis v. Robertson* [1898] A.C. 616 (H. of L. [Scotland], 1898).

35. In *British-South Africa Co.* v. *De Beers Cons. Mines, Ltd.*, [1910] 2 Ch. 502 (C.A.), the Court of Appeal held that the equity of redemption in a South-African mortgage was governed by English law, the law of the contract, since it was an incident to the *contract.* The judgment was cited in the *Mount Albert* and in the *New Brunswick* cases but not in the *International Trustee* case.

36. See *supra*, p. 239, n. 14.

37. See, *e.g.*, Brannan, *Negotiable Instruments* (6th ed., 1938) 270.

Neither the learned judge of the King's Bench, nor the Court of Appeal, nor the Attorney General pleading the case for the English government, had advanced that argument,[38] and they were right. It is untenable indeed. The problem is why the Lords preferred the poor reason over the good one since it was easy to justify the applicability of American law on broader grounds. The answer seems to be that reliance on broad grounds would have created too much of a commitment for the English government with respect to foreign loans.

The highest courts of other countries, in extending the benefit of the Joint Resolution to the American gold loans of their governments and nationals did not use anything like the strained reasons of the House of Lords. They frankly admitted the applicability of American law on the ground of the bond terms which were all substantially like those of the English Morgan loan, except perhaps that there was in the other cases no alternative place of payment besides New York—a point of very little weight and actually not referred to by the House of Lords. The Joint Resolution was applied on those broad bond terms by the Supreme Courts of Sweden [American gold dollar loan of 1924],[39] of Norway,[40] of Denmark,[41] and by a Finnish Court.[42] The Supreme Court of Austria (Great Senate)[43] likewise held the Joint Resolution applicable to the American tranches of the Austrian "League of Nations Loan" and the "International Federal Loan"

38. See the regretful remark by Lord Atkin, *supra*, n. 33 at 555.

39. Two judgments of Jan. 30, 1937, *Bull. I.I.I.* XXXVI (1937) 327, tr. into English in *Guldklausulmålet* (Stockholm, 1937) 130, 147, and into German *Z.A.I.P.* 1942, 835, 837. An opinion rendered by the present writer and submitted to the court by the Swedish National Debt Office, is published in *Guldklausulmålet* I (1935) 295.

40. Judgment of Dec. 8, 1937, *Bull. I.I.I.* XXXVIII (1938) 71; *Revue de Science et de Législation Financières*, 1937, 646, (reversing City Court of Oslo, Nov. 17, 1936, *Bull. I.I.I.* XXXVI [1937] 85).

41. Judgment of Jan. 30, 1939 (German translation in *Z.A.I.P.* 1942, 825). This was a loan of the Danish Government, which was listed on the Amsterdam and Rotterdam Stock Exchanges after the Danish Government had declared that the bonds and coupons presented would be paid there at the rate of exchange of the dollar. The court held that after the American abrogation of the gold clause which was attached to the dollar, guilders were due at the rate of exchange of the paper dollar regardless of Dutch law. See *infra*, p. 430.

42. City Court of Helsingfors, Dec. 23, 1937, *Bull. I.I.I.* XXXVIII (1938) 280.

43. This is a special division (Senate) of the court with a larger number of judges than an ordinary Senate.

of 1930.[44] This Court, referring partly to particular Austrian Conflict-of-Law provisions, based its opinion cumulatively on three grounds: that the currency chosen was American ("law-of-currency theory"); that the bonds, in fact, were issued in the United States ("place-of-contract" theory); and that the United States was the place of payment ("place-of-payment" theory). A sounder procedure would have been to base the opinion on the concurrence of those (and certain other) American contacts of the loan. The Austrian opinion is remarkable because it makes it clear that the several tranches of a financially undivided loan may have different legal settings. It was only the special contacts of the American tranche which made American law applicable.

In the case of the Serbian and Brazilian loans, there were neither findings nor inferable facts to show that the form of the bonds was exclusively French; the plurality of non-French places of payment points to the contrary. The theory advanced by the Permanent Court that the "substance of the debt" was controlled by Serbian or Brazilian law respectively, is therefore in point, and consequently those laws should have been applied to the gold clause. Since the debtor governments apparently did not plead that the clauses were invalid on the basis of their own law the outcome of the cases would have been the same, namely, to hold the debtor governments liable for the full gold value.

In some cases the validity of refusals by foreign governments to carry out their gold obligations has not been determined in judicial proceedings.[45] The rule under which a foreign govern-

44. Opinion of Nov. 26, 1935, *Amtblatt der Oestereichischen Justizverwaltung* 1935, 106, *J.D.Int.* 1936, 442, 717.

45. When the Polish Government refused to carry out the gold clause of the international Polish Stabilization loan of 1927, it seems to have relied on the Polish law of 1934, Domke, "*Des emprunts d'états libellés en dollars-or*", *J.D.Int.* 1936, 547, 553. This would suggest a defense built up on the "traditional" Conflict-of-Laws doctrine on government obligations. In Belgium a release by the Ministry of Finance (not a law) of April 30, 1933, ordered the holders of gold dollar bonds of the Belgian Government to turn in their bonds for stamping on or before May 4, 1933, purposely excluding by the brevity of time, the American holders. Only stamped bonds were to be paid on a gold basis. See Scroggs, "Foreign treatment of American creditors", 14 *Foreign Affairs* 345 (1935). There is no information as to the legal basis of the Belgian measure. At any rate, its indirectness is highly objectionable and proved prejudicial to non-American holders also. See Swiss Federal Tribunal, Sept. 16, 1937, *Amtliche Sammlung* 63 II 240, where the plaintiffs (Russian emigrants, it seems,) claimed damages from their Swiss bankers for not having presented their Belgian gold dollar bonds in time for the purpose of stamping. This claim

ment enjoys immunity prevents bondholders from bringing suits in foreign courts, and suits in the courts of the defendant state are often precarious. These courts may not even be open to the creditors. After the French government, invoking the Joint Resolution, had declared invalid the gold clause of the French-American loan of 1924, and a bondholder sought protection in the French courts, the French government succeeded in having the plaintiff thrown out of court on the utterly questionable defense that the loan was a matter of public law and therefore not subject to the jurisdiction of the ordinary courts of law.[46] Jurisdiction in gold clause litigation against the United States was taken away from the courts by a Congressional enactment of August 27, 1935.[47]

There was and still is little chance of bringing a suit on government bonds before an international court. Such courts ordinarily decide only between states. Supposing that on the creditor's side the state would espouse the claims of its nationals as France did in the case of the Serbian-Brazilian loans, jurisdiction of an international court would still require consent of the debtor government. Adoption by the latter of the much discussed "optional clause" [48] would not have been sufficient. Under that clause the Permanent Court of International Justice had jurisdiction on "any question of international law," and on "the nature or extent of the reparation to be made for the breach of an international obligation," but payment of a government's bond, without anything else, could not be considered a question of "international law" nor was nonpayment of such bond a breach of an "international obligation." [49] The course taken by the Permanent Court in the cases of the Serbian and Brazilian loans is not in conflict with this view since the optional clause was not in point. The debtor governments had *ad hoc* submitted to the court. This

was dismissed on the broad ground that a depositary banker is not under a duty to take care of the rights connected with the deposited securities.

46. App. Paris, July 20, 1938, *J.D. Int.* 1939, 104, reversing Trib. civ. Seine, May 5, 1937, *Gazette du Palais* 1937 I 925 and adversely criticized in an annotation by André-Prudhomme. The view taken by the Paris court is at variance with the attitude of non-French courts, *supra*, n. 39–44.

47. 49 Stat. 939, 31 U.S.C. 773(b).

48. See *e.g.*, Fachiri, *Permanent Court of International Justice* (2d ed., 1932) 95, 355, 360.

49. Contra, Verzijl "Goudclausule en volkenrecht," *Weekblad van het Recht* 1933 Nos. 12654–6. However, prior to World War II, Austria, which had accepted the optional clause, declared her willingness to arbitrate the gold clause of the Austrian loans. Hill, *The Economic and Financial Organization of the League of Nations* (1945) 78. Actually, arbitration did not come to pass.

fact and the other circumstances of the loan imparted an "international character" to the "dispute." That vague requirement was sufficient under the Covenant of the League to give the Court jurisdiction in case the parties agreed.[50]

III. Public Policy

Even where under the general canons of Conflict-of-Laws, a foreign legal system abrogating gold clauses,—say, the American legal system,—is applicable, nevertheless the forum may decline the application of gold clause abrogation (in our example of the Joint Resolution) for reasons of "public policy," that is, on the ground that such application would be incompatible with major principles of the *lex fori*.[51] This is, of course, a rather flexible notion which gives courts a certain leeway in the recognition or non-recognition of foreign legislation. Generally, as one might surmise, courts of debtor countries were quick to apply the Joint Resolution, thereby cutting down the debts of their own people. They sometimes could not help exhibiting a certain enthusiasm about the American measure, as did the Italian court[52] which considered non-application of the Joint Resolution as contrary to the interest of *Italian* national economy. In fact, the Joint Resolution has been applied by the House of Lords, the[53] Austrian Supreme Court,[54] the Supreme Court of Denmark,[55] the Supreme Court of Sweden,[56] the Supreme Court of Norway,[57] the Belgian Court of Cassation,[58] by Italian courts,[59] and by a Finnish court.[60]

50. Art. XIV of the Covenant of the League of Nations. On the question see Schmitthoff, *supra*, n. 28: Jacoby, "Some aspects of the jurisdiction of the Permanent Court of International Justice," 30 Am.J.Int. L. 233, 236 (1936).

51. The writer has dealt with this subject on a broader basis in *Principles of Private International Law*, (1943) 110, and in "Public policy and the political crisis in the Conflict of Laws," 49 Yale L.J. 1027 (1940).

52. Court Torino, July 7, 1934, *Foro Italiano*, 1934 I 1351, affirmed for procedural reasons by App. Torino, Dec. 27, 1935, *Foro Italiano*, 1936 I 229 [regarding the American gold dollar loan of the *Società Idroelettrica Piemonte*].

53. In *The King* v. *International Trustee etc.* [1937] A.C. 500, *supra*.

54. Opinion of the Great Senate, *supra*, n. 44.

55. Supra, n. 41 and of Jan. 30, 1939 *Bull I.I.I.* XL (1939) 284, *Z.f.I.P.* 1942, 225.

56. Supra, n. 39.

57. Supra, n. 40.

58. Judgment of Feb. 24, 1938, *La Belgique Judiciaire*, 1938, 289, affirming App. Brussels, Feb. 4, 1936, *Pasicrisie Belge*, 1936 II 52, *Sirey*, 1937 IV 1 [American gold dollar loan of the City of Antwerp.] The decision of the Court of Cassation has been annotated at some length by Philonenco; see also *J.D.Int.* 1939, 413.

59. Court Torino, *supra*, n. 52; Court Naples, Feb. 21, 1936 *Foro Italiano* 1936 I 498.

60. City Court of Helsingfors, Dec. 23, 1937. Bull.I.I.I. XXXVIII, (1938) 280.

Among the courts of the creditor states, the Swiss Federal Tribunal flatly declined to apply foreign gold-clause abrogation,[61] on the ground that the use of public policy against foreign law depends on the presence of sufficient "contacts" with the forum which were held not to exist in the case at bar. This "relativity" doctrine, unobjectionable in itself,[62] was also resorted to by the Dutch courts,[63] but in a highly unsatisfactory manner. In the case of the American loan of the "Royal Dutch" [*Koninglijke Nederlandsche Maatschappij tot Exploitatie van Petroleumbronnen in Nederlandsch-Indie*],[64]—an Anglo-Dutch enterprise—and the French loan of the French-Canadian *"Messageries Maritimes"*,[65] the Hooge Raad felt that there was a sufficient "contact" because the bonds were collectible—(not "payable") [66]—in Amsterdam at the New York or Canadian dollar rate, respectively. In the latter case, the collectibility did not appear on the bonds; it resulted from the prospectus and a letter of the company to the Amsterdam Bourse. Nevertheless in both cases the American and Canadian gold clause abrogations were put aside on grounds of public policy. Consequently the companies had to pay the full gold amount. The same thing happened to the German Osram Company, the international loan of which, however, exhibited definitely sufficient "contacts" with Dutch territory.[67] Contrariwise, the Batavia Oil Company [*Bataafsche Petroleum*

61. In the case cited *supra*, n. 22 upholding the gold dollar clause of the loan of the German Osram Company in the teeth of the German legislation of 1936, *supra*, p. 353.

62. References in this writer's *Principles of Private International Law* (1943) 117.

63. Cf. Hijmans, *Allgemeene Probleemen van het Internationaal Privaatrecht* (1937) 231.

64. Judgment of March 13, 1936 *Nederlandsche Jurisprudentie* 1936, 497; French translation in *Bull. I.I.I.* XXXIV (1936) 304. The court speaks in this case of an "international" character absent in the case of the Batavia loan (*infra*, n. 68). This is no adoption of the French "international contract" doctrine. The Court intended only to indicate that the Royal-Dutch loan was not entirely American.

65. Judgment of April 28, 1939, *Nederlandsche Jurisprudentie* 1939, 1377. *Sirey* 1939 V 20. The Rechtbank Rotterdam, court of first resort, had applied the Joint Resolution, judgment of May 18, 1938, *Bull. I.I.I.* XXXIX (1938), 374.

66. *Supra*, p. 388.

67. Hooge Raad of May 26, 1939, *Nederlandsche Jurisprudentie* 1939, 1386, affirming App. Amsterdam, June 30, 1938, *ibid.* 1939, 1225. The Osram loan, though in terms of American gold dollars, was governed by German rather than by American loan. The German law of June 26, 1936, *supra*, p. 353, was held to violate Dutch public policy.

Maatschappij] [68] and the City of Rotterdam [69] were relieved from their gold obligations through application of the Joint Resolution, though a sufficient contact with Dutch territory was evident, particularly in the latter case; the Rotterdam bonds expressly stated their conformity "with the charter of the City of Rotterdam and with the laws of the Kingdom of the Netherlands". This way of discriminating among the gold debtors is too much in accord with Dutch financial interests.

The debtors also pleaded the fact that the Netherlands itself had impinged upon gold clauses, a defense rejected by the court.[70] On this score there is no objection to the court's reasoning. If the country of the forum restricts gold clauses for reasons of national interest, it does not follow that the forum must apply restrictions imposed by a foreign country in the latter's interest.[71]

The attitude of the French courts was consistent with the policy in which their theory of indestructible "international contracts" originated, that is, foreign gold-clause abrogation was disregarded in such contracts, a practice hitting again, though perhaps not exclusively,[72] foreign debtors.[73]

68. Judgment of March 13, 1936, *Nederlandsche Jurisprudentie* 1936, 506; French translation in *Bull. I.I.I.* XXXIV (1936) 315.

69. Judgment of Feb. 11, 1938, *Nederlandsche Jurisprudentie* 1938, 1073; French translation in *Bull. I.I.I.* XXXVIII, (1938) 282.

70. Especially in the *Messageries Maritimes* case.

71. The same theory has been followed by App. Brussels, Feb. 4, 1936, *Pasicrisie Belge* 1936 II 52, *Sirey* 1937 IV 1, affirmed by Belg. Cass., Feb. 24, 1938, *Bull. I.I.I.* XXXIX (1938) 105; and by the City Court of Helsingfors, *supra*, n. 42. The issue is more important in connection with exchange control, *infra*, p. 461.

72. App. Paris, Oct. 26, 1933, *J.D. Int.* 1934, 943, denying Patenôtre and Banque de France the benefit of the Joint Resolution. Actually, there was no gold clause involved in that case, so that application of the Joint Resolution was out of the question anyhow. *Supra*, p. 382, n. 23.

73. App. Paris, April 3, 1936, *D.P.* 1936 II 78 at 87 [disregarding the Egyptian decree of 1935); Trib. civ. Seine, Jan. 18, 1928, *J.D.Int.* 1928, 669 [disregarding Italian gold clause abrogation]; cf. App. Paris, April 19, 1928, *J.D.Int.* 1928, 695 [disregarding a Polish ordinance of March 19, 1924, which reduced the obligations issued by Polish companies (in the instance: by the *Société des Charbonnages de Sosnowice*) and expressed in foreign currency, to one-third in value].

A gold obligation contracted in 1918 between Russians in the Ukraine, contrary to Bolshevik law, was held valid by the Trib. civ. Seine, Jan. 2, 1930, *Gazette du Palais* 1930 I 488, on the ground that under the rule of the "white guardist" General Denikin, Tzarist law not derogating the gold clauses applied. The same Tribunal, July 23, 1936, *Sirey* 1938 II 25, concerned with the American gold dollar loan of the German *Sie-*

German developments exemplify the rule of law under national-socialism. Concerned with the 1926 gold-dollar loan of the *Deutsche Sparkassen-und-Giroverband*, the *Reichsgericht*, by a judgment of May 28, 1936,[74] discarded the Joint Resolution for reasons of public policy, but confined the holding to those bonds which at the time of the American enactment were held by German residents. Foreign residents were thus discriminated against, notwithstanding that these were bearer bonds conferring identical rights upon every holder regardless of personal qualifications. Discrimination against non-Germans was, of course, in the spirit of national-socialism, the virtues of which were duly praised by the court. But all this did not satisfy the Hitler government. It upset the judgment by a law of June 26, 1936, which for a still greater relief of the German debtor corporations, struck out the gold-clauses entirely while later legislation took away from the creditors the greater part of the resulting profit by way of a special tax.[75] The elaborate judgment was banished from the official reports of the court.

Common law courts do not make much use of public policy as a limit upon the functioning of choice-of-law rules.[76] Instead they work with the tool of interpretation, or sometimes misinterpretation, of the disfavored foreign statutes so vigorously that the statute becomes apparently inapplicable to the case at bar. Gold clause abrogation furnishes a classical example of that typical method.[77]

Public policy is important also as a recognized reason for refusing the enforcement of foreign judgments. That is why a country which has abrogated gold clauses will not be willing to enforce foreign judgments recognizing such clauses.[78] This may

mens and Halske Company, brushed aside the Joint Resolution, pointing out among other reasons that the loan was an "international" contract because there was a flux and reflux of capital across the *German* frontier—a surprising extension of the "international contract" doctrine. The decision was duly criticized in an annotation by Mestre.

74. *J.W.* 1936, 2058.

75. *Supra*, p. 353.

76. More on this in the writer's *Principles of Private International Law*, 38.

77. *Infra*, p. 438. The tendency to read convenient limitations into the foreign statute also appears in French cases, *infra*, p. 437, n. 14.

78. There is no recorded instance squarely in point, probably because creditors were aware of their poor chances. But there is a characteristic kindred case. The Court of Oslo, in a decision dated Dec. 12, 1934 (German translation in *Z.A. I.P.* 1936, 633), denied recognition to the judgment of the Supreme Court of Denmark, dated June 21, 1933 and cited *supra*, n. 24. The Norwegian court held that the express gold clause present in this

be done on the ground of the general law of procedure, yet in some cases special statutes have been enacted for the protection of local debtors held liable by foreign courts to gold payment. A Canadian statute of 1939, to be discussed in the following section, is the most remarkable instance.[79] From a practical point of view, it is therefore the country of the debtor's domicile that holds the "sword of justice" in this matter.

Section 30

GOLD CLAUSES INTERNATIONALLY

(B) The Applicable Laws

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I. The Joint Resolution

An internationally relevant feature of the Joint Resolution consists in its limitation to debts payable in money of the United States.[1] Bonds framed in terms of Canadian dollars, for instance, are not included. On the other hand, the Joint Resolution contains no limitation as to the creditors and debtors. Congress intentionally extended the effects of the Joint Resolution to the gold obligations of non-American debtors as well as to gold obligations to non-American creditors.[2] After the House and Senate

case had not actually been contracted for, because its meaning was not perceived by the debtor, and it considered the contrary opinion of the Danish court, which evidently was accurate, as irreconcilable with the principles of good faith and therefor with Norwegian public policy.

79. Gold Clauses Act, 1939, *Bull. I.I.I.* LXI, (1939) 84. Other enactments of the same type are the Manitoba and New Brunswick Acts, *supra*, p. 281, n. 5, and the Brazilian decree-law No. 236 of 1938, *Diario Oficial* of Feb. 5, 1938, see *Commerce Reports* (ed. by the U. S. Department of Commerce), 1938, 197.

1. See the text of the Joint Resolution, *supra*, p. 282, n. 5.

2. *Bethlehem Steel Co.* v. *Zurich General Accident & Liability Ins. Co.*, 307 U.S. 650, 59 S.Ct. 856, 83 L.Ed. 1280 (1939); *Hartmann* v. *U. S.*, 65 F.Supp. 397 (Ct.Cl., 1946); *Compañia de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N. E. 671 (1935), *cert. denied*, 297 U.S. 705, 59 S.Ct. 443, 80 L.Ed. 943 (1936), commented on in 45 Yale L.J. 723 (1936); 34 Mich.L.Rev. 726 (1936).

committees had reported the Resolution favorably, Secretary of the Treasury William H. Woodin gave the following explanation:

> "Internationally, adoption of the resolution might mean a reduction of more than $2,500,000,000, in terms of foreign currencies, in debts owed to the American government and American business by foreign debtors. There would not be a commensurate loss to the American creditors unless they wished to use the repaid funds internationally.
>
> "Treasury and Commerce Department figures show that this reduction would result because payments from abroad on private or governmental debts need no longer be made in gold. Dollars of any type, which have been selling at a discount of at least 10 per cent in terms of foreign monies,[3] could be purchased and used to discharge the debt. Since the governmental debts owed America total more than $11,000,000,000, and the long term investments of Americans abroad amount to more than $15,000,000,000, the reduction in terms of foreign currencies as long as the dollar continues to sell at a discount of 10 per cent could aggregate about $2,500,000,000." [4]

In the House of Representatives the bill was even attacked as "framed in the interests of the foreign debtors of the United States." [5] In fact, the benefits of the Joint Resolution have been granted to non-American debtors on the largest scale.[6]

Of course, Americans owing gold-dollar debts to non-residents have likewise profited from the Resolution, but their number may be regarded as negligible if the absence of judicial record is a criterion. The situation is the very reverse of the French one from which the doctrine of "international contracts" evolved. The action of the Congress is an example of fairness in international dealings, the more unusual because the course taken by other states was generally discriminatory against foreigners.

3. Namely, in the market of May, 1933.

4. *U. S. News*, May 20–27, 1933, p. 3, col. 2. In the *Compañia de Inversiones* case, *supra*, n. 2, the court points to the fact that though Senator Carter Glass, in committee, moved to exempt foreign obligations from the Act, this amendment was lost in committee. The remarks of Senator Fletcher referred to by the court do not seem pertinent.

5. By Representative McFadden of Pennsylvania, 77 Cong. Rec. 4538 (1933). Similarly, Representative Beedy, *ibid.*, at 4542.

6. See the *Compañia de Inverstones* case, *supra*, n. 2, and the foreign cases, *supra*, p. 429. The absence of space and time limitation in the Joint Resolution was particularly emphasized by the Supreme Court of Norway, Dec. 8, 1937, *supra*, p. 426, n. 40.

American courts have further expanded the international range of the Act. On this score the judgment of the Supreme Court in *Guaranty Trust Co. of New York* v. *Henwood*[7] is of particular significance. It is concerned with the multiple currency bonds floated abroad by American corporations as mentioned earlier in this volume.[8] The Supreme Court subjected them to the destructive impact of the Joint Resolution. A typical bond in question was "dollar thousand payable in gold coins of the United States of America, of or equal to the standard of weight and fineness as it existed on January 1, 1912" (date of issuance); it carried the clause that the bond was "payable, at the option of the holder . . . in London, England, at £205.15.2 sterling, or in Amsterdam, Holland at 2490 guilders, or in Berlin, Germany at 4200 marks . . ." When the dollar depreciated holders presented their bonds in Amsterdam in order to obtain guilders which had not yet depreciated. The Supreme Court, however, by a five to four decision, held that the Joint Resolution had done away with any right of holders in excess of the nominal dollar amount. Actually, no more could be inferred from the Joint Resolution than the abolition of the gold clause contained in the phrase "dollar thousand *payable in gold coins,* etc.," the effect being that by virtue of this alteration, a thousand dollars pure and simple had to be paid and that the option for francs, guilders and marks stood unaffected. Neither the text nor the legislative history of the Act offered the slightest clue for the court's hypothesis that Congress had intended an encroachment upon multiple currency clauses, as such. Clearly the latter presented a different problem from gold clauses. Ordinary foreign currency debts were never subjected to the Joint Resolution. Consequently, an American obligated in terms of guilders had to disburse guilders without ado; only the additional privileges which the multiple currency clause conferred upon the creditor destroyed, according to the court, his right to guilders—a perplexing result. Hence the American debtor corporations received more relief than they had asked for at the time when they made guilder payments dependent upon the submission of proper affidavits.[9] The dissent-

7. 307 U.S. 247, 59 S.Ct. 847, 83 L.Ed. 1266 (1939). The decision was followed in *Bethlehem Steel Co.* v. *Zurich General Accident & Liability Ins. Co.*, 307 U.S. 265, 59 S.Ct. 856, 83 L.Ed. 1280 (1939). For a full discussion of the situation see the writer's "Multiple currency and index clauses," 84 U. of Pa.L.Rev. 569 (1936).

8. *Supra*, p. 392.

9. *Supra*, p. 392. The majority opinion barely touched upon the real problems presented. Refuting some of the weaker arguments of the plaintiff, it pointed out that despite the multiple option there was *one* monetary obligation of the debtor and that the dollar obligation was

ers in the court included the incumbent Chief Justice and the later Chief Justice Stone. Another great authority, Judge Learned Hand, had equally upheld multiple currency clauses in the teeth of the Joint Resolution.[10] The actual decision belongs to those judgments of highest courts which while perhaps serving a national interest, give offense to the ideal of justice in international relations through the striking weakness of their reasoning. Fortunately, the strong and authoritative opposition which the decision met within the judiciary, and which made the outcome of the case a hazard, does much to alleviate the unfortunate impression which the case must create.

The New York Court of Appeals likewise helped to expand the range of the Joint Resolution.[11] In a gold clause litigation in which both plaintiff and debtor were foreign corporations, American law undoubtedly applied, because the bond at bar was a typical American gold dollar bond with every indication that the debtor had placed it under American law. But the court went out of its way by declaring that an American court must apply the Joint Resolution regardless of whether the debt would otherwise be governed by some foreign law. In other words, the court made the Act an absolute command of American "public policy." There seems to be no justification or practical necessity for such an extreme view.

Conversely, attempts have been undertaken to read into the Joint Resolution the requirement of an American place of payment.[12] This tenet is another outgrowth of traditional over-

"payable" in the United States though the bond was presented in the Netherlands. However, if all this be conceded, the applicability of the Joint Resolution implies only that the gold clause attached to the dollar option was invalidated by the Joint Resolution.

10. In *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern R. Co.*, 81 F.2d 11 (C.C.A.2d, 1936). Application of gold-clause abrogation to multiple currency clauses was also rejected by Trib. civ. Brussels. April 7, 1936, *BullI.I.I.* XXXV (1936) 130, Trib. comm. Brussels, Dec. 17, 1936, *ibid.* XXXVII (1937) 81; full text in Plesch, *Recueil d'Arrêts et de Consultations sur la Clause-Or* (1937) 67, 72. The correct view was also taken by the Court of Helsingfors, Dec. 23, 1937, *Bull.I.I.I.* XXXVIII (1938) 280, with respect to Finland's American gold dollar loan of 1928. In this case, however, the dollar-gold-clause was coupled, *on a current-rate-of-exchange basis*, with a multiple *collection* clause (*option de place*). The gold clause being struck out by the Joint Resolution, an ordinary dollar debt remained, the equivalent of which had to be computed in foreign currency according to the existing rate of exchange.

11. In the *Compañia de Inversiones* case, *supra*, n. 2.

12. Thus in the *Travellers Bank* v. *Patenôtre* case, [in that case ac-

emphasis on the "place of performance" so common since Savigny's day.[13] If a realistic view is taken, that place does not carry much weight in an analysis of gold clause abrogation. This is particularly true of the Joint Resolution which is sweeping in text and legislative intent with regard to gold clauses. Still less merit can be found in the theory of French and Belgian courts [14] that the Joint Resolution is necessarily inapplicable outside the United States—as if there had never been a private international law.

As a matter of curiosity, it may be mentioned that a Viennese Court of first resort was faced with the problem to pass on the constitutionality of the Joint Resolution before the Supreme Court had spoken. The court adroitly extricated itself from the embarrassing situation, which revealed a noteworthy Conflict problem indeed.[15]

II. The Canadian Gold Clause Abrogation

Canada enacted a Gold Clause Act in 1937.[16] The Act differed from the Joint Resolution, the structure and phraseology of which it followed generally, in that it encompassed gold clauses governed by the law of Canada even where the obligation was enacted in terms of non-Canadian money—a situation not infrequent in Canadian foreign financing. This provision was crucial in the case of the gold-sterling loan of the New Brunswick Railway Co.[17] As was mentioned, the Court of Appeal had brushed

tually no gold clause existed *supra*, p. 382, n. 23] and by the Austrian Supreme Court, Dec. 5, 1935 *Die Rechtsprechung* 1936, 22 *J. D.Int.* 1936, 717. In the *Compañia de Inversiones* case, *supra*, n. 2, reference is made to the American place of payment, but only as one of the facts warranting application of American law according to general Conflict rules.

Foreign courts applying their own law have sometimes set forth the place-of-performance requirement, *infra;* the Dutch court of first resort in the *Royal Dutch* and *Batavia* cases, *supra*, pp. 429, 430, even with respect to the Joint Resolution, judgment of Feb. 15, 1934, *Weekblad van het Recht* 1934 # 12719.

13. *Supra*, p. 147.

14. App. Paris, Oct. 26, 1933, *J. D. Int.* 1934, 943; *Trib. civ.* Antwerp, Jan. 5, 1935, *Bull.I.I.* XXXII (1935) 93, relying upon an opinion by Professor de Visscher, Louvain [in Plesch, *The Gold Clause* (2d ed., 1936) 110]. The judgment, however, was virtually reversed in another case regarding the same loan and holding the Joint Resolution Applicable, *supra*, p. 429, n. 58.

15. Judgment of March 1, 1934, *Die Rechtsprechung* 1934, 82.

16. 1 Geo. VI, c. 33. Similar statutes were enacted by Canadian Provinces. *Supra*, p. 281, n. 5.

17. *New Brunswick Ry. Co.* v. *British and French Trust Corp. Ltd.*, [1939] A.C. 1 (H. of L. 1938), commented on by Domke, *J.D.Int.* 1939, 744. See also *supra*, p. 421.

aside the Canadian Act on the basis of a place-of-performance theory which was plainly untenable. The House of Lords, while discarding this theory reached the same result mainly by a baffling interpretation of the Act. The latter (sec. IV), prescribed that where a Canadian gold clause obligation was payable in non-Canadian money "tender of the nominal or face amount of the obligation" in that money "shall be legal tender and the debtor shall, on making payment in accordance with such a tender, be entitled to a discharge of the obligation." The phraseology is somewhat circumstantial, but the meaning is clear: the debtor, by paying the face amount, is entitled to a discharge of the obligation without paying the excess required by the gold clause.

However, Lord Maugham, L. C., held that it was the *intent of the Canadian legislature* to confine the provisions of the Act to cases where the action was brought in Canada. Why so? Because in the opinion of the Lord Chancellor the effects of making a tender are procedural in nature and the Lord Chancellor could not "think that the Legislature of Canada was attempting to alter the course of procedure in any country except Canada." Certainly, the Canadian Parliament can not be charged with such an attempt, but the procedural theory of the Lord Chancellor was entirely without foundation. While there are procedural ways—not pertinent here—of discharging a debt (principally through payment into court), the subject of discharge of debts is in itself clearly substantive in nature and has always been so considered; the Lord Chancellor's theory is novel and unsupported.[18] Even if it be accepted, it was not binding upon a legislature, and there is nothing to indicate that the Canadian legislature acted on it. Quite the contrary is true. Considering the objective of the Act and its special consideration of obligations in *foreign* gold currency, the legislature, by a restriction to suits brought in Canada, would have unreasonably weakened if not destroyed the usefulness of its Act. Not a word of the Act buttresses the hypothesis of the Lord Chancellor. To make the intention of the Legislature still clearer, sec. VI of the Act stated that "every gold clause obligation is hereby declared to be contrary to public policy and

18. Without exception, the subject of discharge of contracts is dealt with in the treatises on Conflict-of-Laws as a part of *substantive* law. Says Cheshire, *Private International Law* (2d ed., 1943) 353: "There can be no doubt that the question whether a contract has been discharged by some act or event is one which must be determined by the proper law" [that is, the proper law of the contract]. For English and American examples of the application of foreign substantive law in matters of discharge of obligations, *supra*, p. 369, n. 37 par. 2.

no such obligation shall hereafter be contained in, or made with respect of, any obligation." The Lord Chancellor found that this section—which was almost literally taken from the Joint Resolution—was confined to *future* contracts. He did not consider the phrases "*every* gold clause", "is hereby declared, etc.," nor did he wonder that supposing he was right the Canadian legislature had rather foolishly acted at variance with the other legislatures abrogating gold clauses. In fact, in 1937, there was no longer a need for *future* gold clause regulation. At that time the clause had definitely disappeared from private contracts. The paramount objects of the enactment were evidently the numerous gold clauses existing at the time of the enactment.

Practically, the interpretation by the Lord Chancellor deprived the Act of any significance. It is noteworthy that the Joint Resolution while open to the same construction as the Canadian Act, has never been subjected to a similar interpretation. Not a single writer among those hostile to the Joint Resolution has ventured such an extravagant argument. Much less has the theory been considered by American or foreign courts. In *Rex* v. *International Trustee,* it did not occur to the Lords that the English-American loan of 1917 was excluded from the Joint Resolution of 1933 because the loan was made earlier. In the New Brunswick case itself the other Lords did not espouse the reasoning of the Lord Chancellor, but they all adopted the argument of non-retroactivity. They also advanced some highly technical objections to applying a statute enacted after the judgment of first resort was rendered. This point need not be examined here especially as the members of the court refuted each other in this respect.[19] The wide differences among the Judges alone bring into relief the lack of a compelling reason for the conclusion reached. That conclusion, however, would have been fully justified on the ground of public policy. After all, here was a Canadian debtor who, offering a gold clause and utilizing the facilities of London banking, had floated the loan in England. The latter country had not abrogated gold clauses. Certainly there would not have been any legal obstacle to invoking public policy. But the court was not only impeded by the general aversion of English courts to use this weapon, but such use would

19. See *supra*, p. 417, n. 7. Lord Romer (at 45) also felt that the "method of discharge" of the bonds was in any case governed by the law of England because London was an alternative place of payment. Against this reasoning, opposed also by Cheshire, *op. cit.*, see *supra*, p. 419. The theory of Lord Romer is further obscured by the assumption that the "measure" of the obligation remained under Canadian law.

have been utterly embarrassing after the House of Lords had applied the Joint Resolution to the Morgan loan. Be that as it may, an unpleasant feeling about the whole affair remains. After the acceptance of the Joint Resolution in favor of the English government the elimination on strikingly specious grounds of gold clause abrogation protecting Canadian debtors is a challenge to justice. The absence of a dissent in the court can only add to the feeling of uneasiness that the case is bound to arouse.

The Canadian government did not acquiesce in the decision. Quickly it enacted the Gold Clause Act of 1939,[20] which amended the 1937 statute so as to make it "weather-tight" against misinterpretation.[21] The new Act also forbade, though not retroactively, the enforcement of foreign judgments disrespecting Canadian gold clause abrogation.[22] Moreover it barred without restriction gold claims and their enforcement against works and undertakings subject to the legislative authority of the Canadian Parliament. The New Brunswick Railway falls into this category. Thus the judgment of the House of Lords was effectively checkmated.[23]

III. Other Laws Abrogating Gold Clauses

Outside the North American area we find in the laws abrogating gold clauses several internationally relevant features. The Dutch law of 1937 contemplated only "internal" agreements; the Polish law of 1934 only gold debts payable in Poland; the Swedish act relates only to bonds issued in Sweden[24] (the existence of such provisions further suggests that similar territorial limitations should not be employed by courts without express statutory direction).[25] Other statutes evince a retaliatory feature. In

20. 3 Geo. VI, c. 45.

21. Particularly by elaborating the retroactive feature of the law.

22. § 8 of the Act. It bears upon Arts. 91, 92 of the Canadian Constitution (British North American Act, 1867), which places railways, except those of a purely local (intraprovincial) character under the authority of the Canadian Parliament. The exception does not apply to the New Brunswick R. Co.

23. This little piece of intra-empire legal warfare has been ignored in English and Canadian legal textbooks and periodicals, nor has the decision of the House of Lords—surely an interesting document—been subjected to any searching scrutiny. It is all an example of Commonwealth discipline.

24. References *supra*, p. 281, n. 5.

25. This was done, however, by the Court Bucharest, June 12, 1920, *J. D. Int.* 1922, 196, when it declined application of the Roumanian law restricting gold-clauses to a "gold" bill of exchange payable in Athens. At the same time, the court, perhaps on the ground of *ordre public*, disregarded the Greek law abrogating gold clauses. Thus the unfortunate drawee, excluded from the benefits of both Roumanian and Greek law, became a victim of legal theory.

Poland [26] and Austria [27] enforcement of foreign gold clauses was abrogated where this had already been done by what we have called the "law of the currency." This procedure was aimed especially at "gold-dollar" clauses. Hungary enacted a retaliatory act, which, however, adopted the test of the law of the creditor's domicile rather than the law of the currency.[28] The German acts of 1936 were likewise retaliatory in their treatment of contracts, but the criterion there was whether the foreign currency had been devalued; in that case gold clauses attached to it would be discarded.[29] In France a rather arbitrary international practice of gold clause abrogation was effected through an unprincipaled method of delineating "internal" and "international" contracts.[30]

IV. Public International Law

Gold obligations are not infrequently found in public international law. The latter has probably become the main province of the clauses since 1931. They appear primarily in peace treaties,[31] in conventions on international communications,[32] and

26. Act of June 12, 1934 (§ 4). *Dziennik Ustav R. P.* 1934, No. 509. For an application of a "gold dollar" clause, see Polish Supreme Court, March 17, 1935, *Zeitschrift für Osteuropäisches Recht* (New Series), IV 518.

27. Gold Clause Law of April 27, 1937 (supra, p. 281, n. 5), § 2. Where the "law of the currency" had abrogated the gold clauses only partially, nevertheless all gold clauses attached to a sum couched in terms of that currency were stricken out. See Domke, "Les efforts législatifs tendant à restreindre la validité de la clause-or," *Revue Critique de Droit International*, 1938, 24, 35, n. 1.

28. Act of Feb. 10, 1923; German translation in the writer's *Vertraglicher Schutz gegen Schwankungen des Geldwerts* (1928), 92. The Act leaned on an Austrian decree of June 14, 1921, *Bundesgesetzblatt*, 1921, No. 317, replaced by the 1937 law cited in the preceding note.

29. *Supra*, p. 353.

30. *Supra*, p. 270.

31. Peace treaties of Versailles with Germany, Art. 262; of St. Germain with Austria, Art. 214; of Neuilly with Bulgaria, Art. 146; of Trianon with Hungary, Art. 197. Furthermore, peace treaties of 1947 with Italy, Art. 74(6); with Bulgaria, Art. 21(3); with Hungary, Art. 23(2); with Roumania, Art. 22(2).

32. Universal Postal Union of 1947, Art. 31, *Treaties and Int. Acts Series* No. 1850; Telecommunication Convention of 1932, Art. 32, in M. O. Hudson, *International Legislation* VI (1937) 109 (cf. also African Telecommunication Union Agreement of 1935, Art. 28, *ibid.* VII (1941), 180); Convention on Transport of Goods by Rail of 1924, Art. 56, *ibid.*, II (1931) 1393. See also *infra*, n. 44.

Another instance is the International Wheat Convention, Appendix A (3), English *Treaty Series*, 1933, n. 38 (gold value clause). Concerning gold obligations in the *Codex Juris Canonici* of 1917 *supra* p. 233, n. 51.

in international financial agreements.[33] In addition to treaties, judgments of international courts may give rise to gold obligations.[34] In present times the gold obligations engendered by the Agreement on the International Monetary Fund,[35] are in the fore.

Within the sphere of international law a stricter view regarding gold stipulations must be taken. Reference to loose language practically invalidating "gold" phraseology cannot be countenanced.[36] On the other hand, the assumption of tacit gold clauses may be easily resorted to inasmuch as it might be improper for a state, in relations of public international law, to rely on the depreciation or devaluation of its own currency promised when it was generally considered as stable.[37]

For similar reasons a state cannot invoke its own gold clause abrogation for defeating gold obligations incurred under international law toward another state, the rule being well settled that no state can free itself from an obligation imposed by international law by changing its internal law.[38] Hence, under a recognized rule of interpretation,[39] a municipal act restricting gold obligations should be understood as not referring to obligations incurred under international law (as distinguished from ordinary contract law). This question became relevant in the case of the Hay-Bunau-Varilla Treaty of 1903 by which the United States acquired control of the Panama Canal Zone from Panama, for a payment of ten million dollars "in gold coin of the United States" in addition to an annuity, during the period of control, of $250,000 "in like

33. The Constituent Charter of the Bank of International Settlements in Basle, § 2, expresses the capital stock of the Bank in Swiss gold francs. Cmd. 3484 (1930) p. 111.

No gold clause proper underlies the Act of Congress restoring to the Philippines the original gold value of the bank accounts held by the Philippine Government with American banks [for the regulation of the rate of exchange Philippines-New York], 48 Stat. 1115 (1934) (cited by Mr. Justice McReynolds dissenting in the Gold Clause Cases, 294 U.S. 361, 378, 55 S.Ct. 419, 426).

34. *Supra*, p. 411.

35. Articles of Agreement of the International Monetary Fund, particularly Art. III(3) (a) and IV(1). *Infra*, sec. 38 I.

36. A serious international conflict arose when, after the suppression of the Boxer riots, the Chinese Government tried to "interpret" away the "gold" debt incurred, especially toward France, in the settlements of 1901 and 1905. Toynbee, *Survey of International Affairs*, 1925, II 368.

37. This is the view taken in the Montano case, *supra*, p. 413, n. 46.

38. Harvard Law School, "Research in international law: law of treaties," Art. 23, Am.J.Int.L.1935 Supp., 1029.

39. Oppenheim, *International Law* I (6th ed. by Lauterpacht, 1947) sec. 554(3).

gold coin."[40] This obligation was not affected by the Joint Resolution. The absence from the Treaty of the formula, customary in private contracts, of "the present weight and fineness" was just as immaterial as it was in the *Perry* case.[41] The contemporary dollar, and not a later devaluated dollar, was contemplated by the Treaty. The controversy was settled in 1939 in a way favorable to Panama.[42]

Public international law may also affect private gold obligations in various ways. For instance, communication treaties have placed the liability of carriers toward their customers on a gold basis.[43] Abrogation of gold clauses by public international law has likewise occurred.[44] More important problems of an international-law character are connected with the municipal abrogation of gold clauses protecting foreign citizens. Generally such abrogation is a permissible exercise of sovereignty. Actually, the tremendous number of abrogating enactments, none of which exempted foreign creditors, have not given rise to diplomatic

40. Art. XIV of the Treaty, 33 Stat. 2234; Malloy, *Treaties, Conventions* etc. II (1910) 1349.

41. *Supra*, p. 286.

42. General Treaty with Panama, *Treaty Series* No. 945, Art. VII; U. S. Dept. of State, *Bulletin* I (1939) 83 ("gold dollars" replaced by "gold balboas" which are outside the scope of the Joint Resolution. *Supra*, p. 433).

43. The treaties cited *supra*, n. 32, not only establish relations between governments in terms of gold, but also, and preponderantly so, regulate the liability of the postal, telecommunication, and railway enterprises on the same basis. The gold basis has furthermore been adopted in the Convention for the Unification of Certain Rules Relating to Ocean Bills of Lading of 1924, Art. 9, Hudson, *supra*, n. 32, II (1931), 1344; in the Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels of 1924, Art. 15, *ibid.*, II 1332; and in the Convention for the Unification of Certain Rules Relating to International Air Transport of 1929, Art. 22, *ibid.*, V (1936) 100. These Conventions, however, allow the signatory states to translate the gold amounts into national currency, a procedure resulting in the elimination of the gold clause. See, e.g., the Carriage-of-Goods-by-the-Sea Act of 1936, 49 Stat. 1207, Art. 4, par. 5, 46 U.S.C. 1300, enacted on the basis of the Convention on Bills of Lading of 1924.

44. The clearing procedure of the Peace Treaties of Versailles, St. Germain, Trianon, and Neuilly, *supra*, p. 441, n. 31, carried with it an abrogation of gold clauses through the compulsory conversion of debts into the currency of the victorious power. Thus, the French-German Mixed Arbitral Tribunal awarded to a French gold-dollar creditor of a German debtor depreciated francs computed on the pre-war parity. Judgment of April 10, 1924, *Recueil des Décisions des Tribunaux Arbitraux Mixtes* IV, 400. There were special restrictions upon gold clauses in life insurance policies. See *Assicurazioni Generali* v. *Selim Cotran*, [1932] A.C. 268 (Pr.C., 1931).

protests, apart from two cases which occurred prior to 1931 when abrogation became more or less universal. In one of these cases the United States was a party. The President of Guatemala, by a decree of December 22, 1903, abrogated the gold clauses; [45] gold claims on Guatemala debtors, held mostly by American bankers, were thereby reduced to approximately one-sixth of their value.[46] As a result of protests by the American and other governments, the President of Guatemala on September 14, 1904, repealed the decree which it seems was actually discriminatory against foreign creditors.

More important was the German-Swiss gold-mortgage controversy—a sequel of World War I. Before the war, Swiss mortgage banks and insurance companies had made investments on a large scale in gold mortgages on German real estate. They were therefore severely affected by the German ordinance of 1914 abrogating the gold clauses. The Swiss Government protested strongly against the ordinance as a violation of international law to the extent that the rights of foreign creditors were infringed. In 1920 it won virtual recognition of its theory by a treaty in which Germany restored the gold clause in favor of Swiss mortgagees who in return agreed to extend the term of payment ten or fifteen years and to reduce interest.[47] It is noteworthy that a few years later the Swiss Federal Council rallied to the "Tantalus" interpretation [48] adopted by the *Reichsgericht* to do away with the pre-war gold clauses.[49] There can be no doubt that the non-discriminatory German ordinance of 1914 was a legitimate exercise of sovereign power over property situated in Germany.[50] The compromise solution of the controversy was due partly to Germany's weak international position and partly to mistakes on the part of the German negotiator.[51] The general interest of the controversy

45. See *Foreign Relations of the United States, 1904* (Washington, 1905) 346–51.

46. Letter of Messrs. G. Amsinck & Co. to Mr. Hay, American Secretary of State, *Foreign Relations*, etc., (*supra*, n. 45), 348.

47. Treaty of Dec. 6 and 9, 1920, *R.G.Bl.* 1920, 2023. See Geiler-Pfefferle, *Das Schweizerische Goldhypothekenabkommen* (1924); K. Schroeder, *Die Deutsch-Schweizerischen Staatsverträge über Goldhypotheken* (1927).

48. Release of Jan. 15, 1924, *Schweizerische Juristenzeitung* XX (1924) 309. See *supra*, p. 249, n. 3.

49. *Supra*, p. 248.

50. *Infra*, p. 449, n. 14.

51. See the writer's "Das Goldhypothekenabkommen mit der Schweiz", *Recht und Wirtschaft* 1921, 50. Apparently the German negotiator had believed in the Swiss thesis (later expounded by Jagmetti, *Schweizerische Juristen-Zeitung* XXI (1925) 179) that rights of non-German creditors were not subject to German legislation. This appears from

lies in the fact that maintenance of the gold clauses ultimately proved impossible. The Swiss creditors, despite the protective treaty and additional advantages conceded by the German Government, were unable to obtain the gold amount, since the burden exceeded the capacity of German real-estate owners to pay.[52] This outcome, which had been predicted, brings home the absurdity of forcibly upholding gold clauses.

the semi-official German communiqué in *Berliner Tageblatt* of Jan. 4, 1921 (evening issue), and its refutation, *ibid.*, Jan. 7, 1921.

52. Additional agreements between Germany and Switzerland were concluded in 1923 and 1934; *R.G.Bl.* 1923 II 284, and *ibid.*, 1934 II 357. The 1923 agreement, reshaping the juridical basis of the treaty, followed the lines submitted by this writer, in advisory capacity, to the German-Swiss negotiating committee and was published in *Berliner Tageblatt* (Financial Section) of Dec. 28, 1922.

Chapter 3

(A) International Antagonism

INTERNATIONAL ANTAGONISM—INTERNATIONAL COOPERATION

Section 31

EXCHANGE CONTROL FROM WITHIN

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I. Introduction—Historical [1]

"Exchange control" means literally control of foreign money or, more precisely, of media of international payment [2] by the government, the term "exchange" being used here in the same sense as in "rate of exchange." Actually, "exchange control," has come to include government control with respect to any financial intercourse with foreign countries whatever the currency. The Articles of Agreement of the International Monetary Fund prefer the term "exchange restrictions." [3] Following common usage we

1. League of Nations, *Report of Exchange Control* C. 232 M 131 (1938); Domke, *Trading with the Enemy in World War II* (1943) 313; id., *Supp. [The Control of Enemy Property]* (1947), 202; id., "Foreign exchange restrictions (A comparative survey)," Journ.Comp.Leg. & Int.L. XXI (1939) 54; Schoo, *Regimen Juridico de las Obligaciones Monetarias* (1940) 829; Lemkin, *La Reglémentation des Paiements Internationaux* (1939); Lennhoff, *Privatrechtliche Probleme des Deviscnnotrechts* (1932). Das *Devisenarchiv*, a periodical (1936–38), was especially devoted to this subject. A considerable part of the more valuable literature in the field concentrates on the private international law aspects of the subject. *Infra*, p. 461, n. 1.

2. This term is sometimes preferred with an eye to exchange restrictions. See *e.g.*, Treaty of Commerce of 1937 between the United States and Siam, League of Nations, *Treaty Series* CXCII 247, Art. III, par. 6, and Trade Agreement of the United States and Turkey of 1939, *ibid.*, CCII 129, Art. 8.

3. Art. III, § 2(a) of the Agreement, however, speaks of exchange control regulations and Art. VIII § 5(a) (xi) of exchange controls. In other international treaties the term "exchange control" is more

propose to employ the phrase "exchange control" for the national systems in question, and to reserve the term "restrictions" for the individual rules of which exchange control is composed. Foreign *expressions for exchange control are régime des dévises,*[4] *Devisenbewirtschaftung.*

Exchange restrictions are not entirely new. The various interdictions of the mercantilist and pre-mercantilist era concerning coins and bullion, especially the prohibition to export precious metals and the attendant administrative and punitive measures, were similar. For instance, one is keenly reminded of modern conditions by Edward III's Statute of Staple which permits "merchant strangers" to take out of the country the same amount of money they had brought in, provided the latter amount had been put in writing by the "searchers." [5] Interdiction of the importation of certain foreign coins—decreed for the protection of the sovereign's coining prerogative—and the common practice of rating admitted foreign coins are other types of early regulation. However, in post-mercantilist times, and especially during the happy century that preceded World War I, restrictions vanished. World War I and its aftermath brought about a flurry of relatively mild exchange restrictions,[6] but the picture changed completely with the outbreak of the world monetary crisis in 1931. Since then each country, without exception, has in one way or another fallen victim to exchange restrictions. Differences are great, but only in degree. Just as in the matter of revaluation, German regulations have been the most methodical and elaborate. Relaxation after World War II has not been great as yet. Only the United States and Switzerland have restored a measure of "exchange freedom," but there, too, important parts of exchange

often found. See, *e.g.*, Provisional Commercial Agreement between United States and Chile of 1939, League of Nations, *Treaty Series* CLXXXVII 217, § 3(a); Preliminary Commercial Agreement between South Africa and Czechoslovakia of 1937, *ibid.*, CLXXXIX 97, § 111.

4. *Devises*, like "exchange," originally referred to bills of exchange. Remarkably, that Latin word has received its present significance in German usage (we observed an analogous phenomenon in the word history of "inflation," *supra*, p. 192.

5. 27 Edw. III, c. 14 (1353). On English exchange control in the 16th and 17th centuries, see Tawney's brilliant Introduction (1925) to Thomas Wilson's *Discourse on Usury* [of 1572], pp. 134 *et seq.*, 149 *et seq.* The Royal "exchangers", *supra*, p. 99, were the official organ for centralizing and monopolizing the trading in foreign exchange.

6. A summary of the pertinent laws of the various countries up to December, 1922, is found in Bernstein, "Ausländische Devisenordnungen," *Steuer und Wirtschaft* (a periodical), 1923, 31. Further references in the writer's *Das Geld* (1925) 56, n. 3.

control have been maintained. In either country transactions in gold are subject to strict government supervision; and while in Switzerland gold may still be privately owned, gold has been fully nationalized in the United States since 1933;[7] moreover, restrictions do exist in this country, though now more potentially than actually, under the Freezing Order of 1940.[8] In fact, there is hardly a country without exchange restrictions.[9]

Modern exchange control operates through a system of government licenses which juridically represent lawful exemptions from statutory prohibitions. The effects reach far beyond the monetary field proper. For instance, since an importer needs foreign exchange for payment, and since any remittance abroad, as well as the procurement of foreign exchange, require licenses, exchange control leads to control of import trade; and the importer will receive licenses only where sufficient foreign exchange is available and is placed at his disposal by the government. Similarly, exchange control entails government regulation of export trade because the exporter must deliver the foreign exchange received to the authorities who will also see to it that he will not, by underbilling or otherwise, divert parts of it to himself. Even internal trade, and especially banking, will be affected in many ways. Enforcement of exchange control may encroach upon the privacy of the mail, and generally upon personal liberty. All this requires a tremendous machinery. At the same time exchange control must continually adapt itself to shifting conditions and find new means to meet the tricks of evaders. Thus exchange control regulations wherever they exist are in constant flux with a tendency to intensify. Basic statutes are relatively terse, leaving wide leeway to the administration. Nevertheless those statutes, too, are subject to sudden and incisive changes[10] provoking oversights and mistakes.[11] Numerous international agreements,

7. Regarding gold regulations in the United States, *infra*, sec. 43 II, in Switzerland, *supra*, p. 79, n. 29.

8. The contrary hypothesis of the I.T.O. Charter, *Dept. of State Publication* 3206, Art. 24(6) (d) first sentence is unrealistic. The draftsmen of the Charter seem to have lost sight of the gold restrictions. Concerning convertibility see *infra*, n. 47.

9. Perhaps the city of Tangier is an exception, cf. *Monetary Notes* (ed. by Spahr) Oct. 1949, p. 4.

10. For instance, France codified her exchange control law, accumulated in the course of years, by the Act of July 15, 1947, Sirey, *Collection Complète des Lois* 1947, 448; but as early as February 2, 1948, a fundamental change was introduced through the establishment of a free market for gold and certain foreign currencies, Sirey, *ibid.*, 1948, 99.

11. *Infra*, p. 453, n. 26.

similarly variable, further contribute to the complexity of the situation.

Exchange control has rapidly destroyed the free world market of foreign exchange which existed, apart from the repercussions of World War I, until 1931. As a result, most currencies are no longer "interchangeable," or, to use a more convenient if less accurate term, "convertible" into each other. At present only the U. S. dollar and the Swiss franc can be considered as freely convertible, whereas other currencies enjoy at best a limited convertibility. Within the area of the sterling bloc the block currencies are interchangeable (regional convertibility). Convertibility and inconvertibility of currencies are relative concepts.[12]

II. General Pattern of Exchange Control

Exchange control looked upon from the legal angle exhibits, if complete, the following typical features:

1. Residents—nationals or not—must surrender their foreign exchange, and often their gold and foreign securities to the authorities. Nationals (and possibly alien residents) may be compelled to surrender such property held abroad.[13] Property of non-residents if located within the country is likewise affected.[14]

12. The Articles of Agreement of the International Monetary Fund Art. XIX (d) give the term "convertible currency" a particular and absolute meaning. Cf. also the Fund's *Annual Report* (1949) 28.

13. American nationalization of gold has not been extended to foreign gold holdings of American subjects. Cf. 37 Op.Att.Gen.155 (1933). Besides, the law of the country where the property is situated takes precedence over the national law of the owner. Hyde, *International Law*, I (2 ed., 1945) 640.

14. *Uebersee Finanz-Korporation A. G.* v. *Rosen*, 83 F.2d 225 (C.C.A.2d, 1936), *cert. den.*, 298 U.S. 679, 56 S. Ct. 946, (1936); *British-American Tobacco Co.* v. *Federal Reserve Bank of New York*, 104 F.2d 652, 105 F.2d 935 (1939), *cert. denied*, 308 U.S. 600, 60 S.Ct. 131, 84 L. Ed. 502 (1939); *United States* v. *98 $20 U. S. Gold Coins*, 20 F.Supp. 354 (E.D.Pa.1937). In the *British American Tobacco* case the Court, consisting of Judges L. Hand, Swan, and Augustus Hand, made the following statement: The plaintiff seems also to suppose that the power of the United States is subject to some international limitation, which, as we understand it, its municipal judges must recognize and apply, as a kind of overriding *jus gentium*. However convenient such a revival of the old theory of 'Natural Rights' may be in diplomatic dealings with feebler nations, it is not otherwise to be taken seriously." This sally was not warranted. There can be no doubt that the sovereign has full power over objects found in his territory. Oppenheim, *International Law* I (6th ed. by Lauterpacht, 1945), sec. 170.

It is important in the matter at hand that immunity granted to foreign states by international law does not extend to foreign central banks organized as separate juristic persons, *supra*, p. 69, n. 59.

Residents may not dispose of, by collection or otherwise, debts held against non-residents nor can they obligate themselves toward non-residents through contracts or through opening of credits—all this irrespective of the currency involved.[15]

2. Foreign currency must not be exported; domestic currency must be neither exported nor imported (the import prohibition counteracts illegal exports and to some degree foreign currency speculation).[16]

3. Non-resident creditors, irrespective of the currency involved, cannot have the sum owed transferred. Unless they prefer to wait for a favorable decision of the exchange authority or for the end of the control, foreign creditors can obtain no more than payment into a "blocked" account opened on behalf of the creditor with an eligible domestic bank. Exchange control legislation may go further and authorize the debtor to discharge his debt by such a payment, though the creditor would prefer to wait.[17]

4. Rates for foreign exchange and gold are fixed by government fiat. They determine not only the compensation for foreign exchange and gold surrendered to the government, but as a rule the selling price asked for by it, and the valuation of foreign ex-

15. *Sometimes the exchange control* law allows an importer to arrange for an export (perhaps with another party or between other parties) equivalent to the import intended by him, so that directly or indirectly, a set-off becomes possible. These *private Kompensationsgeschäfte* (private set-off transactions) remain under government regulations and may lead to considerable legal complications. See Swiss Federal Tribunal, Nov. 4, 1947, *Praxis des Bundesgerichts* XXXVII 39; Schlesinger "Privatrechtliche Probleme bei Internationalen Waren-Verrechnungsgeschäften," *Schweizerische Juristenzeitung*, XXXII (1935), 37. A similar barter transaction authorized by the German exchange control authorities has been considered in Re *Parana Plantations, Ltd.* [1946] 2 All.Eng.R. 214 (C.A.).

16. According to the *Reichsgericht*, Oct. 26, 1936, *J.W.* 1937, 319, the *prohibition against the importing* of reichsmarks was aimed primarily at forcing non-German debtors to discharge their debts in non-German currency. This would have been an unlawful and immoral kind of pressure where the debtor was obligated in German currency.

17. The issue was discussed at length by the *Reichsgericht*, *infra*, n. 56. Cf. also Ital.Cass., April 26, 1947, *Banca, Borsa e Titoli di Credito*, (a periodical) N.S. I (1948), part 2, p. 44.

The local creditor suing the foreign bank or office has to prove the existence of his claim under the foreign law, *Egyes* v. *Magyar Nemzeti Bank* 165 F.2d 539 (C.C.A. 2d, 1948) [Hungarian exchange control]. In *Bures* v. *The Reichsbank*, 258 App.Div. 873, 17 N.Y.S.2d 1004 (1939), the same problem was in the background of the case.

change for customs and other taxation purposes. The proclaimed rates are binding also in private law relations. Often they try to reproduce monetary conditions of a happier past by ignoring later decline of the national currency. The government may fix different rates for the same currency, varying, for instance, with the goods bought or sold. Different rates may also develop as a result of discriminatory treatment of foreign creditors, especially of their blocked bank accounts. The government may permit various uses of the account, depending upon the time of its establishment, upon the nature of the underlying transaction, upon the nationality of the creditor, etc. One speaks in this situation of "multiple-currency rates" (as distinguished from "multiple-currency clauses", supra, sec. 27) which often take the form of divergent "official" and "free" rates. Determination of the basic currency value which necessarily must be single will then encounter particular difficulties.[18]

III. Types of Exchange Control

The general pattern as outlined has assumed different forms in the various countries.[19]

German exchange control developed step by step from the last years of the republic until the end of the Hitler régime.[20] In its

18. Cf. International Monetary Fund, *Annual Report*, (1949) 24, and *infra*, p. 484.

19. Only legal types of exchange control are considered above. Economic types have been described by Ellis, "Exchange control and discrimination," *Am.Econ.Rev.* 1947, 877.

20. The main phases of the development are indicated by (1) the *Verordnung über die Devisenbewirtschaftung* (Exchange Control Ordinance of May 23, 1932, *R.G.Bl.* 1932 I 231, consolidating earlier ordinances) (2) the *Gesetz über die Devisenbewirtschaftung* (Exchange Control Law) of Feb. 4, 1935, *ibid.* 1935 I 114; and (3) a law of the same caption of Dec. 12, 1938, *ibid.* 1938 I 1721. The law of June 9, 1933, *ibid.* 1933 I 347 creating the *Konversions-Kasse für Deutsche Auslandsschulden* (Office of Conversion for German External Debts), was likewise important. Excellent commentaries on the 1932 decree were published by Lion and Hartenstein, *Steuer- und Devisennotrecht* (1932), and on the 1935 law by Hartensteln, *Devisen-Notrecht* (1935). The essence of the German regulations was maintained by the occupation authorities. Law No. 53, *Military Government Gazette*, Issue A, June 1946, p. 36.

The international interest in German exchange control is attested to by a number of valuable non-German studies which, though primarily economic in character, also offer some information on the legal aspects. The comprehensive work by Howard I. Ellis, *Exchange Control in Central Europe* (1941), which includes an analysis of the Austrian and Hungarian systems, should receive first mention. Another outstanding study, though

elaborate systematic form refined by the high art of German legal science, it exhibited all the features of the pattern described. Its distinctive trait was the ruthlessness, characteristic of the régime; in the words of a New York Court it "reflected financial sadism at its worst." [21] From the beginning of the control the latter included assets held abroad by German nationals.[22] The belief of an American court that a German resident national might use his American assets to pay off his American debts was without foundation.[23] Never was there a law less "territorial." [24] The régime took a special interest, remarkable from the viewpoint of international law, in "emigrés." They remained subject to German control with regard to debts held by them and created before emigration, a rule which applied to emigrant creditors and debtors alike.[25] On this score again the German law was misunderstood abroad. An English court assumed that German law itself had abandoned control over emigrés settled outside Germany (the German rule was, of course, fantastic, but it could not be ignored if German law was applied). Another point affecting non-German relations was the extreme use of multiple currency rates. Among the various German types of blocked accounts the "Aski" (*Ausländer-Sonder-Kontofür Inlandszahlungen,* i.e., foreigners' spe-

limited in scope, is U. S. Tariff Commission *Foreign Trade and Exchange Control in Germany* (Report No. 150, 1942). See, furthermore, Harris, *Germany's Foreign Indebtedness* (1935); Piatier, *Le Contrôle des Dévises dans l'Economie du III Reich* (1937). The major documents concerning the Conversion Office are collected and translated in Foreign Bondholders' Protective Council, *Annual Report, 1936,* pp. 469 et seq.; same, *1937,* pp. 417 et seq.

21. *Pan-American Securities Corporation* v. *Friedrich Krupp A.G.*, 169 Misc. 445, 6 N.Y.S. 993, 999 (1938). And the Swiss Federal Tribunal Oct. 8, 1935 *Amtliche Sammlung* 61 II 242 spoke of the "disastrous effects of German exchange control legislation." The notorious "People's Court", as early as 1936, received power to inflict the death sentence where "gross selfishness or other base motives in shifting or leaving assets abroad" had caused "grave damage to the national economy." Law against Sabotage of National Economy of Dec. 1, 1936, *R.G.Bl.* 1936 I 999.

22. Cf. § 4 of the 1932 ordinance, *supra,* n. 20.

23. *Central Hanover Bank and Trust Co.* v. *Siemens & Halske Aktiengesellschaft,* 15 F.Supp. 927, 929 (S.D. N.Y., 1936), *aff'd* 84 F.2d 993 (C.C. A.2d, 1936), *cert. den.* 299 U.S. 585 (1936), 57 S.Ct. 110, 81 L.Ed. 431.

24. The 1938 law, *supra,* n. 20, subjects even rights of German residents in foreign immovables to the control. Regarding the "territoriality" doctrine as applied to exchange control, see *infra,* p. 463.

25. Decree of Dec. 1, 1935, *R.G.Bl.* 1935 I 1408; Law of 1938, § 55. The same rule was implied under earlier regulations. Hartenstein, *supra,* n. 20, at § 15, n. 5.

cial accounts for inland payments) were outstanding.[26] Foreign, e.g., American exporters, were encouraged to send goods to Germany in case they would accept payment wholly or in part into such accounts. The resulting "Aski marks" could then be used for purchasing German goods in order to export them to the country of the creditor. The Aski marks were saleable. By removing, in particular cases, the restrictions laid upon them, the German government was able to convert them into "free marks" which could be used for whatever German money might purchase. This was especially done on behalf of German exporters, recipients of "Askis." [27] Such practice resulted in hidden export subsidies and in discrimination against foreign countries.[28] The

26. *Graumann* v. *Treitel*, [1940] 2 All.Eng.Rep. 188, 195 (K.B.), commented on by Mann, "Problems of the rate of exchange," Mod.L.Rev., VIII (1945), 185, and Samuel, "Migration and foreign law," U. of Toronto L.J. 1945, 145, 161. It is significant of the difficulties in keeping abreast with the ever-changing exchange control regulations that the 1935 decree was overlooked in the *Graumann* case by the testifying expert witnesses on German law. A decision of the *Reichsgericht* concerned with general conditions of foreign parties, rather than with the special rules for emigrants, was urged upon the court which consequently reached a wrong and most unsatisfactory result. Unaware of the restrictions laid by German laws upon the litigated debt, the court thrust the inflated official rate of exchange of the mark on the defendant debtor, who, under German exchange control and other German adverse regulations, had probably been more or less stripped of his fortune. As told by Samuel, the claim was actually settled for one-third of the judgment amount, a fact which Mr. Samuel, though he does not mention the German provisions, praises as a victory of the "living law."

The *Graumann* case has been followed in *Sabl* v. *Laenderbank*, 33 N.Y. S.2d 764, 765 (Sup.Ct.1942), and has been cited in *Ginsberg* v. *Canadian Pacific Steamships, Ltd.*, 66 Lloyds L.Rep. 206, 215 (K.B.1940), but in the latter case the situation was different. *Infra*, p. 472, n. 45. For a comprehensive discussion of the emigrants' situation under the former German exchange control, see R. Neumann, *Devisennotrecht und Internationales Privatrecht* (1938) 100.

27. Cf. *e.g.*, U. S. Tariff Commission, *supra*, n. 20, at 15. The use of "Aski" marks and of some other types of German "ersatz" marks was expressly barred by the German-Canadian Treaty of Commerce of 1936. League of Nations, *Treaty Series* CLXXIII 312, Art. VI.

28. The schemes of the Hitler Government were set forth at length in 38 Op.Att.Gen. 489 (1936) and in 39 *ibid.* 261 (1939). The latter opinion describes an ingenious device which attained the bounty effect by a converse method, namely, by converting "free" marks into blocked marks. The National Socialist Government also used its foreign exchange, the lack of which it pleaded in justification of its exchange control, for the repatriation of German bonds at cut prices which, in their turn, were the result of exchange control. 38 Op. Att.Gen. 494. See generally, *infra*, p. 476.

American government reacted strongly, imposing "countervailing" duties against imports from Germany.[29]

English exchange regulations started practically with the outbreak of World War II,[30] and grew by and by so as to cover the whole area of foreign financial relations.[31] To this extent there is no basic divergence from the German system. Still, the pertinent decrees and their administration reflect the difference between a democratic and a totalitarian régime. The British system is much more geared at winning the cooperation of the public and far more considerate and flexible. Hence it has not given much rise to legal dispute or to litigation. In the early part of World War II a "free" market for "old sterling" accounts whose use was limited, existed alongside the official "sterling rate" but was gradually eliminated.[32] A "free trade" of sterling notes sprung up later but did not attain great significance. De-

29. Treasury Order of June 4, 1936, 69 *Treasury Decisions*, 1008, upheld in *F. W. Woolworth Co.* v. *U. S.*, 115 F.2d 348, and *V. Mueller* v. *U. S.*, 115 F.2d 354 (both C.C.P.A., 1940). The diplomatic steps taken by the American Government have been listed by Securities and Exchange Commission, *Report on Protective and Reorganization Committees*, V (1937), 421. The German viewpoint was presented by Ritter, Head of Department in the German Foreign Office in "Germany and clearing agreements," *Foreign Affairs* XIV (1938), 465. Some points were not without merit, cf. 143 *Commercial and Financial Chronicle* I 811 and 1133 (1936).

30. They are found mainly in the Defence (Finance) Regulations, 1939, S. R. & O., 1939, No. 950, 1067 and 1620, and the Exchange Control Act, 1947, 10 & 11 Geo. VI, c. 14. Surveys of these two master regulations are given by Mann, "Exchange restrictions in England," 3 Mod.L.Rev., 202, (1940), and "The Exchange Control Act, 1947," 10 *ibid.*, 411 (1947). The voluminous legislative and administrative material as of June 1, 1948 is fully presented by F. C. Howard, *Exchange and Borrowing Control* (London, undated).

Since 1928 the Treasury has had power to requisition gold. Currency and Bank Notes Act, 1928, 18 & 19 Geo. V, c. 13, § 11(2).

31. Says Mann, 10 Mod.L.Rev., 413, of the 1947 Act: "The practitioner must become aware of the fact that the Act makes almost everything and anything illegal (in the absence of a license) that has any contact, however remote it may be, with abroad." Picket v. Fesq [1949] 2 All E.R. 705 (K.B.), makes it clear that the regulations laid down must be observed even under very trying circumstances.

32. See Enke and Salera, *International Economics* (1947) 566. The dual rating gave rise to *Barr* v. *U. S.*, *infra*, p. 484.

Canadian exchange control, introduced by the Foreign Exchange Control Order of Dec. 13, 1940, P.C. 7378, represents probably the mildest form of exchange control. Accounts were blocked for transfers, but there were many exceptions. No "blacklist" existed as under American and English law, *infra*, n. 41. See Foreign Exchange Control Board, *Annual Report to the*

finitive features of the English system consist in the preferences for the members of the Sterling Bloc areas.[33]

The general pattern of exchange control has been departed from by those countries which allow a "free" market, carefully circumscribed by law, of gold and selected foreign exchanges, to coexist with the paramount exchange control. That market not being "black" (prohibited) is often called "parallel" in order to avoid the ambiguity of the phrase "free market." [34] Such a dual market system was introduced in 1933 by Argentina [35] and was adopted after World War II by Italy [36] and France.[37] The free market rates will, to some extent, influence the proclaimed rates prevailing in the exchange control segment of the national economy, and will generally press toward greater flexibility of the system.

The American "Freezing Order" decreed in March 1940 after Germany had invaded Norway,[38] is still further removed from the general pattern of exchange control. Its primary objective was

Minister of Finance for the Year 1946 (Ottawa, 1947); Rasminsky, *Foreign Exchange Control in Canada* (Ottawa, 1941).

33. *Infra*, p. 510.

34. Apart from the frequent identification of "free" and "black" market, one speaks, especially in France, of "official free rates," meaning official rates freely alterable by the authorities in contrast to the rigidly fixed "par rates."

35. Salera, *Exchange Control and the Argentine Market* (1941); a good summary in Enke and Salera, *supra*, n. 32, at 354.

36. A helpful account of the Italian regime is found in Bank for International Settlements, *18th Annual Report*, 1947–48, p. 89.

37. Law of Feb. 2, 1948, Sirey, *Collection Complète des Lois*, 1948, 99.

38. Executive Order No. 8389 of April 10, 1940, 5 Fed.Reg. 1400, as amended, especially by Executive Order No. 8785 of June 14, 1941, 6 Fed.Reg. 2897. See U. S. Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), a highly informative paper; Freutel, "Exchange control, freezing orders and the Conflict of Laws," 56 Harv.L.Rev. 30 (1942) [it is more accurate to speak of one "Freezing Order"]; Bloch and Rosenberg, "Current problems of freezing control," 11 Fordham L.Rev. 71 (1942).

As early as the Emergency Banking Relief Act of March 9, 1933, the President was given power to place foreign exchange transactions under government control. 48 Stat. 1, 12 U.S.C. 95(a), Art. I, § 2. Thereupon by Executive Order No. 6560 of Jan. 15, 1934, 12 U.S.C.A. 95, note, licensing was required for those transactions, except where entered into in pursuance of normal commercial or business requirements and for reasonable traveling and other expenses. In the absence of congressionally prescribed standards for the exercise of this power, the enactment was of dubious constitutionality, but the question became academic with the issuance of a general license for exchange transactions by the Secretary of the Treasury. *Federal Reserve Bulletin* 1934, 780.

not so much the husbanding of American foreign exchange for the protection of the national monetary system as economic warfare against the enemy.[39] The Axis powers were to be prevented from utilizing American funds which fell into their hands as a result of invasion or in other ways.[40] While in this country gold had been called in seven years earlier, foreign exchange was not requisitioned under the Freezing Order. Nor were fiat rates for foreign exchange proclaimed. Restrictions were imposed—not upon all financial intercourse with foreign countries, as in the case of typical exchange control,—but only upon the intercourse with certain countries under the control or influence of the enemy. Great Britain and her dominions and colonies, as well as Latin-American and some other countries, were not affected. Instead, transactions were prohibited with designated individuals and corporations suspected of having relations with the enemy ("Proclaimed List of Certain Blocked Nationals", the so-called black-list—a strong and effective measure).[41] The Order has not been revoked but after the war the restrictions on exchange transactions have been gradually removed for "current" transactions.[42] Blocked property of non-enemy nationals has been decontrolled on certification of the holder's government that no enemy has an interest in the property.[43] This arrangement which was allowed to expire by the end of 1948 [44] gave the respective foreign governments a welcome opportunity to assume control over the dollar assets of their nationals. Thus the Freezing Order became an instrument of international monetary cooperation. Even during the war the Order as amended and supplemented by numerous regulations, had waxed far beyond its original objectives.[45]

39. See the publication of the Treasury Department, *supra*, n. 38, at 24, and General Ruling of the Secretary of the Treasury, March 13, 1942, 7 Fed.Reg. 2083.

40. The principles incorporated in the Freezing Order are the basis of a Resolution "Regarding Enemy Assets and Looted Property" adopted by the Bretton Woods Conference of 1944, *Dept. of State Bulletin* XI (1944) 384.

41. The list, as well as a similar British list, was withdrawn on July 6, 1946. *Annual Report of the Secretary of the Treasury for 1945–46*, p. 89. The term "national" is used here in a technical sense. It signifies those affected by the Freezing Order.

42. *Annual Report of the Secretary of the Treasury* for 1946–47, p. 53.

43. *Annual Report of the Secretary of the Treasury for 1946–47*, p. 54.

Cf. Littauer, "The unfreezing of foreign funds," 45 Col.L.Rev. 132 (1945).

44. The "Termination Program for Foreign Funds" is fully set out in *Annual Report of the Secretary of the Treasury* for 1947–48, p. 47.

45. Freutel, *supra*, n. 38, at 31, n. 7, refers to a brief of the United States Government submitted in the case of the *Commission for*

Legally, one can hardly deny that the restrictions imposed by the Freezing Order are in the nature of "exchange restrictions." The prohibition by the Order of unlicensed transactions by any person within the United States—especially of capital transfers by foreigners—is a typical instance.[46] However, the draftsmen of the Articles of Agreement of the International Monetary Fund, apparently did not classify the Freezing Order as an instance of exchange control.[47]

IV. Effects of Exchange Control upon Private Law and Civil Procedure

Under exchange control the debtor is not released from his obligation toward his foreign creditor, nor does he cease to owe foreign exchange promised by him.[48] As long as there is any chance he has to take, at his own expense, the appropriate steps to obtain the necessary transfer permit. As a German appellate court put it, he must exhaust all the avenues of exchange control regulation in order to satisfy the creditor.[49] While the creditor is not barred from bringing suit against him in the local courts, the several systems of regulation differ in that some require a license before the creditor may obtain judgment; [50] others—and this applies to the Freezing Order—require such consent only for the compul-

Polish Relief, *infra*, n. 51, and stating the purposes of Foreign Funds Control in a broad manner, including the protection of American creditors and the preservation of the bargaining position of the United States in post-war negotiations and settlements. Foreign Funds Control, however, is more comprehensive than the Freezing Order.

46. Executive Order No. 8389,—*supra*, n. 38—§ 1(B). The other subdivisions of sec. 1 can also be easily represented as instances of exchange control.

Punishment for violation of the Freezing Order was imposed in a few cases: *U. S.* v. *Moran*, 151 F. 2d 661 (C.C.A.2d, 1945) [transfer of frozen bank accounts]; *U. S.* v. *Zavala*, 139 F.2d 830 (C.C.A.2d, 1944) [importation of money]; *U. S.* v. *Bates*, 148 F.2d 907 (C.C.A.7th, 1945) [acquisition and exportation of gold].

47. Because otherwise the dollar could not be held a "convertible" currency as the existence of "exchange restrictions" on current transactions automatically brings about inconvertibility. *Articles of Agreement of the International Monetary Fund*, Art. XIX(d). On principle, the Order extends to current transactions as do the gold restrictions.

48. Ital.Cass. Jan. 16, 1933, *Settimana della Cassazione*, 1933, 262; App.Milan, Nov. 26, 1937, *Foro Italiano* 1938 I 273, 277 [no "impossibility" defense].

49. App.Naumburg, undated, *Devisenarchiv* 1936, 364.

50. *Reichsgericht*, Feb. 8, 1934, *R.G. Z.* 143, 312; Austrian Supreme Court, March 5, 1936, *Die Rechtsprechung* 1936, 64 [Austrian law] and Sept. 5, 1934, *ibid.* 1934, 178 [referring to Hungarian law]. Somewhat surprisingly, German courts took a more lenient atti-

sory execution of the judgment.[51] Under the Order he may also attach, without license, assets of the debtor which are situated in the state and may thereby create a *quasi-in-rem* jurisdiction against the debtor;[52] a rule which might well hold good in other countries.

Normally, the creditor will receive payment in a "blocked account." Although the term "transfer moratorium" is frequently used to describe the situation, there is, in law, no moratorium. In the absence of special provisions to the contrary, the court is without power to grant the debtor extra time in which to pay. To the extent that transfer is delayed or prohibited there is not, as in an ordinary moratorium, a privilege of the debtor which he may use or not, but a prohibition in the public interest, that he cannot waive.[53] And this prohibition is permanent, not a mere respite such as resulting from a moratorium.

Where foreign currency is owed the creditor is at least entitled to its equivalent in local currency,[54] ordinarily at the proclaimed

tude toward awards, even those rendered by foreign arbitral tribunals. Enforcement decrees were granted in these cases without license, the procurement of which was left to the actual execution. *Reichsgericht*, Nov. 2, 1937, *J.W.* 1938, 468 [arbitral tribunal of the Chamber of Commerce of Zagreb, Jugoslavia]; App. Hamburg, Nov. 25, 1936, *J.W.* 1937, 1251. In App. Celle, April 24, 1937, *J.W.* 1937, 2834 [award by arbitral tribunal of London Corn Trade Association; enforcement granted], the exchange authorities had permitted payment in favor of the Dutch creditor into the "Trust-Account-Netherlands" of the German Clearing Office.

51. *Clark* v. *Federal Reserve Bank of New York*, 82 F.Supp. 740 (S.D. N.Y.1948); *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 262 App.Div. 543, 30 N.Y.S. 2d 690 (1942), *aff'd*, 288 N.Y. 332, 43 N.E. 345 (1942); *Bollack v. Société Générale*, 263 App.Div. 601, 33 N.Y. S.2d 986 (Sup.Ct.1942); *Van der Veen* v. *Amsterdamsche Bank*, 178 Misc. 668, 35 N.Y.S.2d 945 (Sup.Ct. 1942); *Leeds* v. *Guaranty Trust Co.*, 65 N.Y.S.2d 431 (Sup.Ct.1946). The earlier practice had been to the contrary. Cases are listed by Domke, *Trading with the Enemy in World War II* (1943) p. 307.

52. See the *Clark*, *Commission for Polish Relief*, and the *Van der Veen* cases in the preceding note. However, transfer, voluntary or by judicial action, of any asset affected by the Freezing Order requires a license. *Clark* v. *Propper*, 169 F.2d 324 (C.C.A.2d., 1948), *aff'd* 337 U.S. 472, 69 Sup.Ct. 1333 (1949).

53. There is in the German literature and in non-German legal writings in the German language lengthy discussion of whether exchange control regulation does or does not belong to the province of substantive law rather than procedural law. The question, expounded particularly by Dietrich in *Deutsche Justiz*, 1935, 785, 786 and *Bank-Archiv* XXXIV (1935) 516 should be answered affirmatively, but implies over-generalization. Its confusing character appears in the suretyship cases, *infra*, p. 479.

54. See *Reichsgericht*, Dec. 11, 1919, *J.W.* 1920, 373; March 17, 1924, *J.W.* 1924, 1590; Jan. 29, 1937,

rate;[55] he will then receive payment in a blocked account. Yet even under German exchange control it was held that the debtor's inability to furnish foreign exchange because of exchange control, was only "temporary." In the opinion of the *Reichsgericht,* the creditor, asserting his contractual right, could not be compelled to receive reichsmarks in lieu of the currency contracted for except where good faith would require him to do so. In case he did not agree to payment in reichsmarks the debt remained existent, and interest if contracted for continued to run.[56]

Introduction of exchange control will not only affect existing debts but also executory contracts. Foreign sellers of goods have justly been held entitled to rescind their contracts in that contingency.[57]

Agreements entered into subsequent to the enactment, and violative of, exchange control law, are void.[58] There is no objec-

Warneyers Rechtsprechung 1937, 98. In the latter case, choice of German currency was arbitrarily presumed, from the intent of the parties. Cf. also judgment of Oct. 24, 1923, *J.W.* 1924, 1518. The Austrian Supreme Court, judgments of Feb. 8, 1933, *J.W.* 1933, 1687, and App. Florence, July 13, 1937, *Foro Italiano,* 1937 I 1124, have used the same rule.

55. The Austrian Supreme Court, Feb. 1, 1933, *Die Rechtsprechung* 1933, 25, proceeded to a remarkable restrictive interpretation of the Austrian fiat valuation, applying it only to dealings in foreign exchange and not generally to debts couched in terms of foreign currency. At that time, a commercial rate of the Austrian schilling was available.

56. *Reichsgericht,* March 16, 1936, *R.G.Z.* 151, 35; May 23, 1936 (Great Senate), *R.G.Z.* 151, 116; Feb. 22, 1937, *R.G.Z.* 153, 384. Accord: Austrian Supreme Court, Feb. 8, 1933, *J.W.* 1933, 1687, and April 10, 1935, *Die Rechtsprechung* 1935, 122.

Under German law these rules did not apply to the payment of interest, dividends, and similar dues to the Conversion Office, *supra,* n. 20. Payment into this bank amounted to a discharge of the debt. The English Debts Clearings Offices and Import Restriction Act, 1934, *infra,* p. 490, provided that payment to the English Clearing Office effected a discharge of the debt. (Art. I [3].) That Act, however, was a retaliatory measure and was actually not employed. Regarding the question of default (*mora*) see *infra,* p. 470.

57. Austrian Supreme Court, April 10, 1935, *Die Rechtsprechung* 1935, 122; App. Genova, Jan. 28, 1938, *Banca, Borsa and Titoli di Credito* (a periodical) V (1938) 155 [but the Italian buyer is not liable for damages]. *A fortiori,* the right to rescission will be recognized outside the regulating state. Supreme Court of Czechoslovakia, Feb. 6, 1937, *Z.A.I.P.* 1937, 706, with an eye to the introduction of exchange control in Jugoslavia.

58. *Reichsgericht,* March 16, 1920, *R.G.Z.* 98, 254; Nov. 19, 1920, *ibid.,* 100, 237, and other decisions of the same court; Cass. Torino, May 2, 1923, *Foro Italiano* 1923 I 656; Supreme Court of Czechoslovakia,

tion to agreements made under the expressed or implied condition that the license would be granted, or made in the honest belief that a license was not necessary. (In that case the condition has to be read into the contract). The English Exchange Control Act of 1947 contains a provision to this effect.[59]

The following contract clauses were customary or were suggested in German practice before World War II: [60] "The transaction becomes effective when the exchange permit is granted." "The goods are not to be delivered or called for until the exchange permit is granted;" "the contract expires if the exchange permit is not granted by . . ." [datum follows]—a frequent and useful clause—; "the importer may rescind the contract for serious reasons resulting from the terms of the permit" (as where the permit imposes upon the importer unexpected conditions such as a specific use of the goods). In many cases the parties will first submit a preliminary draft agreement to the exchange authorities in order to obtain a decision which may be made the basis for a binding agreement. Guaranteeing by a party of the granting of the permit would probably be considered as an illicit circumvention of the control, but it has been held valid outside the regulating state.[61] Bills of exchange drawn upon a country under exchange control are practicable only with the full cooperation of the exchange authorities. Besides the fact that licenses may be required for the drawing and acceptance, a license for the transfer of the acceptor's payment may be necessary. Otherwise the ac-

March 28, 1922, cited by Wahle in *Rechtsprechung* VI (1924) 126. It is surprising that the Austrian Supreme Court long held the contrary view. Judgments of Dec. 19, 1923, *Rechtsprechung* VI (1924) 56; Feb. 10, 1925, *ibid.* 1925, 85; Feb. 12, 1936, *Juristische Blätter* 1936, 176, here cited from *Die Rechtsprechung* 1937, 82. Later, however, the court adopted the invalidity rule, judgment of Oct. 13, 1937, *Die Rechtsprechung* 1937, 200. The same rule prevails under the American Freezing Order. *Clark* v. *Propper, supra,* n. 52, disapproving *Singer* v. *The Yokohama Specie Bank,* 293 N.Y. 542, 60 N.E. 842 (1944) where the violating transaction was held valid as a matter of contract law. The latter case has also been convincingly criticized by Berger and Bittner, "Freezing controls: The effects of an unlicensed transfer," 47 Col.L.Rev. 398 (1947).

In re Mahmoud and Ispahani [1921] 2 K.B. 716 (C.A.) a sale lacking the license required under the Defense of Realm Regulation Act, 1919, was held void. The defendant won though he had acted mala fide.

59. See *supra,* n. 30, at 33(1), and Mann, 10 Mod.L.Rev. 415 (1947).

60. Lengemann, "Kaufvertrag und Devisenrecht," *Schriftenreihe zum Devisenarchiv, Heft 3,* undated, probably 1937.

61. App. Colmar, Dec. 9, 1938, *Revue Juridique d'Alsace et de Lorraine* 1939, 207.

ceptor may discharge his obligation by payment into a blocked account. He may then retain the bill so that the last holder will be deprived of his recourse against prior holders.[62]

Section 32

EXCHANGE CONTROL FROM WITHOUT [1]

(A) THE PRINCIPLES

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I. Public Policy

To what extent must foreign exchange restrictions be recognized by local courts? The question is in many respects similar to the problem arising from foreign gold clause abrogation. There the issue of "public policy" is in the fore. Generally, public policy considerations recognized in that connection are applicable also in the case of foreign exchange control. Particularly, the fact that the local law itself provides for exchange control, is no valid argument against the non-recognition of foreign exchange control, on grounds of public policy. Public policy considerations are even more weighty in the latter situation. Exchange control

62. For a general discussion of the bill-of-exchange problems under exchange control, see Wegelin, "Devisenzwangswirtschaft, Kursschwankungen und Wechselgeschäft der Banken" in *Zeitschrift für Schweizerisches Recht* 1932, 257.

1. In addition to the studies listed *supra*, p. 446, n. 1, see R. Neumann, *Devisennotrecht und Internationales Privatrecht* (1938) (copiously documented analysis of great acumen); Koeppel, *Die Deutsche Devisengesetzgebung im Internationalen Privatrecht* (1938); Rashba, "Foreign exchange restrictions and public policy in the Conflict of Laws," 41 Mich.L.Rev. 777, 1089 (1943); Freutel, "Exchange control and Conflict of Laws," 56 Harv.L. Rev. 50 (1942); Cohn, "Currency restrictions and the Conflict of Laws," 55 L.Q.Rev. 552 (1939); Weiden, "Foreign exchange restrictions," 16 N.Y.U.L.Q. 559 (1938); Comment, "Foreign exchange restrictions" and the Conflict of Laws," 47 Yale L.J. 451 (1938); Domke, "La législation allemande sur les dévises en droit international privé," *J.D.Int.* 1937, 226 and ("Nouveaux aspects etc.") 990; Mezger, "Les mesures du contrôle des changes et les principes du conflit des lois," *Nouvelle Revue de Droit International Privé* 1937, 527.

is introduced exclusively in the national interest; prevention of payments by local debtors to foreign creditors without license, and other measures detrimental to foreign creditors, form an essential feature of the system. Clearly, one country's policy of exchange control is opposed to the interest of the other countries. The resulting conflict is accentuated by the fact that the exchange authorities, in their discretion, may favor one creditor by granting the license, and disfavor another creditor or perhaps all creditors of a definite country by refusing the license. Foreign courts cannot enter into an examination of that practice, and cannot be expected to bow to the refusal of the license where the creditor is a citizen or resident of the forum.

As a matter of fact, the public policy argument has been sustained against foreign exchange control by French,[2] Italian,[3] German,[4] Swiss,[5] Dutch,[6] Austrian [7] and Norwegian [8] courts. An English case of 1735, refusing for reasons of public policy recogni-

2. App. Paris, July 20, 1939, *Revue de Science et de Législation Financières* XXXVII (1939), 608; see also *infra*.

3. Ital. Cass., July 30, 1937, *Foro Italiano* 1937 I 203.

4. *Reichsgericht*, Oct. 3, 1923, *R.G.Z.* 108, 241, discussed *infra*, p. 472; App. Berlin (*Kammergericht*), Oct. 27, 1932, *J.W.* 1932, 3773; Court Berlin, Feb. 19, 1932, *ibid.* 1932, 2306.

5. Federal Tribunal, Sept. 18, 1934, *Amtliche Sammlung*, 60 II 294; Oct. 8, 1935, *ibid.*, 61 II 242.

6. Hooge Raad (Supreme Court), May 26, 1939, *Nederlandsche Jurisprudentie* 1939, 1383 [concerning the loan of the German Osram Company]. Lower Dutch courts had previously denied recognition of German exchange control on the same ground, for instance, Court Amsterdam, March 22, 1935, *Nederlandsche Jurisprudentie*, 1935, 590; Court Rotterdam, March 30, 1937, *ibid.*, 1938, 686. It is probably on the basis of these cases that a New York court, applying Dutch law, disregarded German exchange control law. *Lann* v. *United States Steel Works Corporation*, 166 Misc. 465, 1 N.Y.S.2d 951 (Sup.Ct., 1938); *Pan-American Securities Corporation* v. *Friedrich Krupp Aktiengesellschaft*, 169 Misc. 445, 6 N.Y.S. 2d 993 (Sup.Ct., 1938), *aff'd without opinion*, 256 App.Div. 955, 10 N.Y.S. 205 (1939). These cases were criticized by the writer in "Public policy and the political crisis in the Conflict of Laws," 49 Yale L.J. 1042 (1940), on the ground that American courts have no business to apply Dutch public policy. However, the counter-argument by Freutel, *supra*, n. 38, at p. 455, seems convincing. Only, in spite of the court and Freutel, this is no case of *renvoi*. On the contrary, Dutch courts cling to Dutch law in the situation at hand.

On a Swiss case involving an analogous problem in the application of American law, see *infra*, n. 54.

7. Austrian Supreme Court, Dec. 10, 1935, *Die Rechtsprechung*, 1936, 22. A judgment of the same court of Sept. 25, 1934, *ibid.*, 1934, 206, would respect Hungarian exchange control in case of reciprocity, but stated that reciprocity did not exist.

8. City Court of Oslo, Feb. 19, 1936, *Bull. I.I.I.* XXXIV (1936) 284.

tion of a Portuguese gold export embargo, may be mentioned as an early predecessor of those holdings.[9] French courts generally prefer the formula that foreign exchange control is inapplicable as "strictly territorial." [10] We have seen how "the territoriality" idea miscarried in the question of the *cours forcé*.[11] Applied to exchange control it is ambiguous. It may mean that foreign exchange control itself does not purport to bring about legal effects in other countries. Such an interpretation of foreign exchange control law would be not only arbitrary but downright false as is graphically demonstrated by the German example. Consequently, the only other possible meaning of "territoriality" is that foreign exchange regulations affecting relations within the jurisdiction and applicable there under general Conflict norms cannot be recognized because of their particular character. This is nothing but an aspect of public policy, obfuscated by the cryptic territoriality concept.[12]

A formula aiming at the same result has here and there been employed by courts when they refused application of foreign exchange regulations as part of foreign "public law." [13] This mold of public policy doctrine is particularly unfortunate because in the matter at hand the courts are actually concerned with the effects of exchange control upon debts and contracts, hence upon private law matters. Moreover, one does not see why courts should generally refrain from applying public law elements of a foreign legal system applicable under the Conflicts doctrine.

However, as was mentioned, English courts in modern times are averse to the use of the public policy concept and its varieties,[14]

9. *Boucher* v. *Lawson*, Cas.Temp. Hardwicke 85 and 194, 95 Eng.Rep. 53 and 125 (K.B.1735), refusing for reasons of public policy (namely, the interest of English trade) to apply a Portuguese law prohibiting the export of gold.

10. App. Paris, June 30, 1933, *J.D. Int.* 1933, 963; App. Colmar, Feb. 16, 1937, *J.D.Int.* 1937, 784. App. Colmar, March 11, 1938, *Revue Juridique d'Alsace et de Lorraine* 1938, 511, suggests the public policy notion by speaking of the "*caractère fiscal, monétaire et politique*" of German exchange control laws.

11. *Supra*, pp. 57, 351.

12. Cf. the writer's *Principles of Private International Law* (1943) 40, n. 29.

13. Swiss Federal Tribunal, Sept. 18, 1934, *Amtliche Sammlung* 60 II 294; City Court of Oslo, cited in n. 8, and a number of decisions of Swiss and Austrian courts listed by Neumann, *supra*, n. 1, at 3, n. 3. Generally, the Swiss Federal Tribunal uses the public policy *(ordre public)* concept, *supra*, n. 5. On the "procedural" theory of exchange control, *infra*, p. 480, n. 14.

14. Enforcement of revenue or penal laws of other countries is denied by English courts, but exchange control does not fall under these concepts. *Frankman* v. *Anglo-Prague Bank*, [1948] 1 All. Eng. Rep. 337,

and so are, to a lesser degree, American and other courts. Yet in spite of this inhibition, courts have preponderantly arrived at non-recognition of foreign exchange restrictions. As was observed above, in the discussion of the gold clause situation, strange arguments have been used to attain the goal which seemed desirable. An American court was confronted with a contract which under its terms was "covered by German law." The court declined to use the public policy argument against German exchange control, since it was "not necessary to assume the pharisaical posture and thank Providence that we are not like other people." Yet surprisingly the court succeeded in discarding German exchange control. The contract, the court admitted, was covered by German law, but "covered" is not "governed." "Governed" it was by New York law.[15]

Again English courts have discarded German exchange control in the erroneous belief that the parties—German emigrants—were no longer subject to control under the terms of the German law.[16] Other courts have arbitrarily read into the foreign law questionable limitations which made it impossible to apply it in the case at bar.[17] More creditable are a few decisions of lower courts which rejected the German debtor's plea of exchange control on the ground that he had not invoked it in an earlier case.[18] The suggestion was that the defense ought not to be taken seriously under the circumstances. Even here reliance on public policy would have been preferable.

342 (K.B.), *aff'd* [1949] 2 All Eng. R. 67 (H. of L.). *Contra: Cermak* v. *Bata*, 80 N.Y.S.2d 782 (Sup.Ct. 1948). Also, the rule itself is vanishing. See Beale, *A Treatise on the Conflict of Laws* (1935) 610.1 and 610.2.

15. *Goodman* v. *Deutsch-Atlantische Telegraphen Gesellschaft*, 166 Misc. 509, 2 N.Y.S.2d 80 (1938).

16. *Graumann* v. *Treitel*, [1940] 2 All. Eng.Rep. 188 (K.B.) *supra*, p. 453, n. 26.

17. *Central Hanover Bank & Trust Co.* v. *Siemens und Halske Aktiengesellschaft*, 15 F.Supp. 927 (S.D. N.Y.1936), *aff'd*, 84 F.2d 993, *cert. denied*, 299 U.S. 585, 57 S.Ct. 110, 81 L.Ed. 431 [American assets not affected by German control]; Supreme Court of Austria, June 12, 1934, *Die Rechtsprechung* 1934, 222 [same mistake]; *Gross* v. *Continental Caoutchouc-Export Aktiengesellschaft*, 175 Misc. 496, 24 N.Y.S.2d 699 (Sup.Ct.1939), rev'd on procedural grounds 262 App.Div. 866, 28 N.Y.S.2d 434 [German exchange control does not forbid payment of debts outside of Germany], (*sic*). See also *infra*, n. 24.

18. Court Middleburg (Netherlands), Jan. 9, 1918, *Weekblad van het Recht*, 1918, No. 10220; Court Zurich, April 23, 1937, *Nouvelle Revue de Droit International Privé* 1937, 627, 634. A similar idea appears in *South American Petroleum Corporation* v. *Colombian Petroleum Co.*, 177 Misc. 756, 31 N.Y.S.2d 771, 775 (Sup.Ct.1941).

II. Elimination of Foreign Exchange Control through Use of General Conflict Rules

The majority of the American and English decisions, however, rest the non-application of foreign exchange control on what appears to be a normal use of general Conflict rules. There are, it is true, cases where on this ground control of the *lex fori* was practically beyond doubt.[19] Particularly where in this country a German or other foreign bonded loan was floated on typical American terms, American law was rightly held controlling.[20] Still there remained a difficulty. Impossibility of performance created by foreign law is considered a good defense [21] in common law, and was relied upon by the German debtors. The leading American case, *Central Hanover Bank* v. *Siemens und Halske*,[22] and the leading English case, *Kleinwort* v. *Ungarische Baumwolle Industrie*,[23] both tried hard to overcome this barrier. The interesting point is that they advanced entirely different theories on the same facts in order to arrive at the same goal which was obviously desirable to reach.[24] A public policy "feel" appears also in the strong language used by the English court, somewhat out of character with the application of an ordinary Conflict rule.[25]

19. For instance, in *Kleinwort Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678 (C.A.), commented on in 3 Mod.L.Rev. 158 (1939); *Ginsberg* v. *Canadian Pacific Steamships, Ltd.*, 66 Lloyds L.Rep. 206 (K.B. 1940), at 228 and cases in nos. 20 and 41.

20. *Central Hanover Bank* case, *supra*, n. 17; *Perry* v. *Norddeutscher Lloyd*, 150 Misc. 73, 268 N.Y.Supp. 525 (1934); *Glynn* v. *United Steel Works Corporation*, 160 Misc. 405, 289 N.Y.S. 1037 (1935); *Marks* v. *United Steel Works Corporation*, 160 Misc. 678, 289 N.Y.S. 1035 (1935); *Sheppard* v. *Hamburg-Amerikanische-Paketfahrt Aktiengesellschaft*, N.Y.L.J., March 14, 1934, p. 1232, *aff'd*, N.Y.L.J., April 6, 1934, p. 1653 (App. Term), *leave to appeal denied* by Appellate Division, see *Glynn* v. *United Steel Works*, *supra*, at 409; *Deutsch* v. *Gutehoffnungshütte*, 168 Misc. 872, 6 N.Y.S.2d 319 (1938); *Barnes* v. *United Steel Works*, 11 N.Y.S.2d 161 (Sup.Ct.1939).

21. Williston, *Contracts* (rev. ed.), secs. 1938, 1951–53.

22. *Supra*, n. 17.

23. *Supra*, n. 19.

24. The American court, by pointing out that impossibility is no valid defense for the nonpayment of money; the English court, by confining the rule to cases where the prohibition originated in the law of the place of performance.

Another question is whether the rule which bothered the courts is valid at all. On this see Williston, *supra* and *Vanetta Velvet Corporation* v. *Kakunaka & Co.*, 256 App.Div. 341, 10 N.Y.S.2d 270 (1939).

25. In the *Kleinwort* case Du Parcq, L.J., at p. 699, gave a most emphatic negative to the suggestion that a foreign sovereign could prevent his subjects from performing their *English* (italics added) con-

The traditional place-of-payment theory likewise plays a role, and has been pushed pretty far, in this matter. There are English and American cases in which foreign exchange control was brushed aside in the name of a place-of-payment theory though the contracts were avowedly governed by the legal system of which the exchange control law formed a part. *Graumann* v. *Treitel* (German law) and *South American Petroleum Corporation* v. *Colombian Petroleum Co.*[26] (Colombian law) are outstanding in this respect. In either case the court based the elimination of foreign exchange control on the theory that the place of payment was London or New York, respectively. In the *Graumann* case this argument was the result of misunderstanding on the part of the court as, under the applicable German law, Berlin was the place of payment.[27] In the *Colombian* case there were two alternative places of payment, Colombia and New York. Hence the emphasis on the New York place of payment in order to discard Colombia exchange control was unconvincing in the case of a Colombian debtor. Besides, the place-of-payment theory is untenable in this situation. The issue does not turn on the "manner" or—under the over-stretched English theory—on the "measure" of payment.[28] To pay or not to pay, that is the question.

Frankman v. *Anglo-Prague Credit Bank*, an English case, is concerned with securities rather than with money, but otherwise fits into the picture. The plaintiff, a Czecho-Slovakian citizen and resident,[29] had deposited securities with a Prague bank, which the bank had bought for him on the London Stock Exchange and had left on deposit at its London branch. When the plaintiff moved to London the bank, through its London branch, declined to deliver the securities because Czecho-Slovakian exchange control law required a license which the Czecho-Slovakian authorities, for undisclosed reasons, refused to give. The contract between the parties was undoubtedly governed by Czecho-Slovakian law; in addition, a clause in it clearly made Prague the place of performance. Hence the King's Bench Division, unwilling to consider the public policy argument, decided against the customer

tracts outside the territory of the sovereign.

26. 177 Misc. 756, 31 N.Y.S.2d 771 (Sup.Ct.1941): see also *Kassel* v. *N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 177 Misc. 92, 24 N.Y.S.2d 450 (Sup.Ct. 1940).

27. Namely, as the place of the debtor's domicile, *supra*, p. 147. *Accord*: Kahn-Freund, 4 Mod.L. Rev. 149 (1940); Mann, 8 *ibid.* 184 (1945).

28. *Supra*, p. 421.

29. For the sake of brevity we have omitted above the fact that the plaintiff was the heir of the original depositor.

"with some regret." [30] The injustice was flagrant and the Court of Appeal reversed.[31] Under the terms of the contract, the familiar place-of-performance theory was of no avail to the Appellate Court.[32] The desirable result, fully warranted on grounds of public policy, was again attained by an utterly strained interpretation of the contract clauses, with discordant opinions.[32a]

30. [1948] 1 All.Eng.R. 337. The case was followed by *Kahler* v. *Midland Bank, Ltd.* [1948] 1 All. Eng.R. 811. During Hitler's occupation of Czechoslovakia a Czech Jew was compelled to cede his London securities to the Czechoslovakian Government. This act of extraterritorial confiscation was recognized as valid by the court. The decision, which is somewhat beyond the purview of our discussion, has been duly criticized by Mann, 11 Mod.L.Rev. 479 (1948). In a similar situation, recognition of Belgian expropriation was denied in *Marcu* v. *Fischer*, 65 N.Y. S. 892 (Sup.Ct., 1946). The confiscatory character of Czechoslovakian exchange control was gainsaid in general terms in *Werfel* v. *Zivnostenska Banka*, 260 App. Div. 747, 23 N.Y.S.2d 1001 (1940), reversed for procedural reasons 287 N.Y. 91, 38 N.E.2d 382 (1941). The case has been critically discussed from the angle of war emergency law by Domke, *Trading With the Enemy in World War II* (1943), 316.

31. [1949] 1 All.Eng.R. 199 [C.A. 1948].

32. The contract made Prague the place of performance "in respect of all obligations resulting from the business connection with us [the bank]," but elsewhere it was said that securities bought abroad for the customer, unless transmitted to Prague at his demand, cost, and risk, would be left "deposited with our correspondent where they shall be subject to the legal measures of the respective country." This clause, relied on by the court, meant only that the customer would have to bear the consequences of those measures. It did not change the fact that the "business obligations" of the parties, including those connected with the deposit, remained performable in Prague under Czechoslovakian law. This was obviously—as recognized by the lower court—the intent of the parties at the time of contracting. The same line of reasoning has been followed by the House of Lords, see next note.

32a. During the printing of this volume it became known that the House of Lords, reversing the Court of Appeal, restored the decision of the King's Bench. The House of Lords, again discarding the public policy rule, looked at the Czechoslovakian Act as a normal exchange control law whose administration should not be considered as confiscatory, [1949] 2 All.Eng.R. 671. Common sense would have demanded the opposite decision. This was a communist government of the Soviet-Satellite type. It refused unconditionally to let the owner have his securities. Whatever the wording of the law, such a situation necessitated the assumption of confiscation. Under analogous circumstances Belg. Cass., March 13, 1947, *Pasicrisie Belge* 1947, 109 reached the opposite result.

Another recent case, *Boissevain* v. *Weil* [1949] 1 K.B. 428 (C.A., 1948) reveals in a different way the new English favor of exchange control. During the last war an English citizen borrowed francs from a Dutch citizen in Monaco where both were stranded, the francs to

In some American cases, too, refugee plaintiffs were allowed to recover their securities in the teeth of foreign exchange control.[33]

III. Money Judgments

But doesn't a judgment against a foreign debtor ordering him to pay in defiance of exchange control expose him to punishment—doesn't it ask the impossible? Actually the courts have bothered little on this objection where on grounds of public policy or of a place-of-performance or other theory of private international law, they have held a foreign debtor liable to payment in spite of foreign exchange control. The essence of a judgment ordering the debtor to pay consists in making his assets available for the satisfaction of the creditor.[34] This view applies with particular force to assets which a foreign debtor possesses within the jurisdiction. It would be strange indeed to deny a local creditor the right to make himself paid out of these assets, only because his right is invalidated by a foreign law and in the sole interest of the foreign country.[35] And the conclusion must be the same where

be repaid in London in pounds sterling. Considering its major "contacts" the transaction was governed by Monaco law, except for the manner of payment, but the court, in the absence of good reasons, declared the applicability of English law to be beyond doubt. Hence the whole Monaco transaction (and it was a bona fide transaction) was deemed void as violative of English exchange control. Thus extension of English exchange control to a foreign transaction was attained without ostensible resort to public policy, though Dennig, L.J., admitted the validity of the public policy conception as a matter of principle.

33. *Van der Veen* v. *Amsterdamsche Bank*, 178 Misc. 668, 35 N.Y.S.2d 945 (Sup.Ct.1942), *aff'd*, 262 App. Div. 989, (1942), and *Loeb* v. *Bank of Manhattan Co.*, 18 N.Y.S.2d 497 (Sup.Ct.1939). In the first case exchange control was ignored because it was imposed by the enemy; in the other the theory of the court is not clear. *Czechoslovakian* law was applied in *Kraus* v. *Zivnostenska Banka*, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup.Ct.1946), a summary judgment, and in the *Werfel* case, *supra*, n. 30. There the bank had no branch within the jurisdiction.

34. The defense of impossibility—legal or factual—has been firmly rejected in this situation by Hooge Raad (Supreme Court of the Netherlands), May 26, 1939, *Nederlandsche Jurisprudentie*, 1939, 1386. The arguments contra are well presented by Neumann, *supra*, n. 1, at 72. See also Dietrich, J.W. 1936, 3013, 3503.

35. In *David* v. *Veitscher Magnesitwerke Aktiengesellschaft*, 348 Pa. 335, 35 A.2d 346 (1944), the court states that German exchange control, to which the defendant was subjected, "cannot affect the jurisdiction of this court in relation to a garnishee and a fund both within the jurisdiction of the court." Similar views have been expressed by foreign courts. Swiss Federal Tribunal, May 8, 1935, *Amtliche Sammlung* 61 II 242; Court Amsterdam, June 23, 1936, *Revue Critique de Droit International*, XXXII (1937) 474.

the debtor has no assets within the jurisdiction. Such assets may be brought in later. Experience shows that in significant cases the pressure resulting from the judgment has prompted the foreign exchange authorities to allow full payment to the local creditor.[36] This line of argument is not simply one of expediency. It brings home the fact that in exchange control cases the foreign government is the real opponent and that, generally speaking, there is no reason why the local courts should submit to the adverse action of the foreign government. Rightly it has been said that it is for the debtor rather than for the creditor to bear the "risk" of exchange control instituted by the debtor's country.[37]

It follows that if the foreign debtor has mortgaged real property within the jurisdiction, and does not pay invoking exchange con-

Attachment of the foreign debtor's funds—for the most part debts due to him—may be obtained for the establishment of jurisdiction (N.Y. Civil Practice Act §§ 232 and 232a), as well as for forced execution. Such attachment may be had by foreign creditors just as by domestic ones. An example is Court of Oslo, Feb. 19, 1936, *Bull. I.I.*, XXXIV (1936) 284 [Norwegian debtor, German creditor under exchange control; attachment granted to the latter's creditor, a Dutchman]. The local debtor himself may, without regard to foreign exchange control, set off a counterclaim against a claim of his foreign creditor. Swiss Federal Tribunal, Oct. 26, 1937, *Amtliche Sammlung* 63 II 383, as diversity of currencies, *supra*, p. 375.

36. Thus the *North German Lloyd*, the *Hamburg-Amerikanische-Paketfahrt*, and the *Siemens-Schuckertwerke*, in consequence of the American judgments cited *supra*, n. 20, were allowed by the German exchange authorities to transfer to America funds for the service of their American loans. See *Moody's Industrials*, 1937, p. 2707 (North German Lloyd); *ibid.*, 1935, p. 2652 *(Hamb.-Am.-Paketfahrt); ibid.*, 1938, pp. 1933 and 1934 *(Siemens und Halske; Siemens Schuckert).* The same thing happened in the case of the *Deutsch-Atlantische Telegraphen Gesellschaft*, according to the *New York Times*, Financial Section, April 23, 1938.

37. Court Amsterdam, June 23, 1936, *Revue Critique de Droit International*, 1937, 474; Court Zurich, April 23, 1937, *Nouvelle Revue de Droit International Privé*, 1937, 627. [The latter case is concerned with the compulsory clearing instituted by Italy against the Netherlands and other Powers in response to the sanctions set up by the members of the League of Nations on the occasion of the Abyssinian war, *infra*, p. 490.]

There might even be collusion between the foreign debtor and his government. In *Lann* v. *United Steel Works Corporation*, 166 Misc. 465, 1 N.Y.S.2d 951 (1938) bonds of the defendant (*Vereinigte Stahlwerke*) of 1926 were involved. The company called in the bonds for redemption which it could hardly have done without the consent of the German authorities. Afterwards it refused to pay alleging lack of license. Passing on the same loan, the Court Rotterdam, July 6, 1938, *Nederlandsche Jurisprudentie* 1938, 1242, held that under the circumstances the impossibility defense was made in bad

trol, the mortgage may be foreclosed.[38] To what extent damages, penalties and other disadvantages designed for tardy debtors are applicable to the situation at hand, will depend on the interpretation of the statutory and contract provisions invoked, especially on the significance of the guilt element under these provisions. The cases on record bear upon damages for delayed payment [39] and upon the right of a foreign resident to bring a suit *in forma pauperis* if his full resources are cut off by exchange control.[40]

The foreign debtor may not avert adverse judgment or other adverse consequences by disbursing under the exchange control regulations, the amount due into a "Conversion Office" of his country. A discharging effect attributed to such disbursement by

faith and the company was estopped from setting it up. Cf. also *Irving Trust Co.* v. *Deutsch-Atlantische Telegraphen Gesellschaft*, 22 N.Y.S.2d 581 (Sup.Ct. 1940) [trust fund for bonds issued by defendant; bonds held by defendant or German Government excluded from distribution].

38. Ital.Cass., July 30, 1937, *Foro Italiano*, 1937 I 1203 [Italian real estate, German mortgagor prevented through German exchange control from transferring funds to Italy]; App. Berlin (*Kammergericht*), March 30, 1932, *J.W.* 1932. 3773 [Hungarian mortgagor, Hungarian exchange control; German emergency protection of mortgagors held inapplicable].

39. Under common law there is no objection to holding an involuntarily defaulting debtor liable for damages. This rule found an unusual application in a German case. A German grain importer, not having obtained a permit to pay abroad for the goods imported, was held liable for damages by an English Arbitration Board. The German exchange control authorities, upon the plaintiff's application, allowed the sum awarded to be paid in his favor on a transferable account. Thereupon App. Celle, April 24, 1937, *J.W.* 1937, 2834, granted enforcement of the English award up to the amount permitted by the German authorities. On the other hand, Ital.Cass., July 30, 1937, *Foro Italiano*, 1937 I 1203, although allowing compulsory execution against the foreign debtor despite foreign exchange control, by a broad ruling eliminated damages. The Swiss Federal Tribunal, Feb. 1, 1938, *Amtliche Sammlung*, 64 II 88, 106, was confronted with the proviso of an American bond that "should the debtor company make default in the payment of interest," the principal would fall due. The court correctly held that in Anglo-American law "default" does not presuppose negligence or bad intent on the part of the debtor; hence his reliance upon exchange control was held unavailing.

On the right of rescinding a contract on the ground of supervening exchange control, *supra*, p. 459.

40. The right was denied to the foreign claimant by App. Darmstadt, Jan. 9, 1935, *J.W.* 1935, 2385 [Czechoslovakian claimant] and by Supreme Court of Poland, May 7, 1936, *Zeitschrift für Osteuropäisches Recht*, N.S., III 332 [German claimant]. The solution may be different where a pertinent treaty between the two states exists. *Infra*, p. 476.

the exchange control regulations will not be recognized elsewhere.[41]

IV. Recognition of Foreign Exchange Control

The rule that foreign exchange control will not be recognized is subject to important qualifications. One of them is derived from the principle that "public policy" is "relative", namely, that in the international area its use depends on the significance of the local "contacts" with the forum.[42] Where the cause of action was originally wholly foreign, and contact with the forum was established merely by the fact that the plaintiff subsequently moved into its territory, courts have shown little inclination to discard the foreign law under which the transaction was made.[43] The idea occasionally advanced by American courts that in such a case a debt "follows" the person of the *creditor* [44] is ill-conceived. The question became significant with regard to refugees from national-socialist persecution. Prior to emigration they had bought and paid for tickets for ocean passage, which for one reason or another were not used. The claims brought by the refugees against the various steamship lines were for the most part dismissed ("ship passage cases");[45] the courts simply applied the

41. *Glynn* v. *United Steel Works Corporation*, 160 Misc. 405, 289 N.Y.S. 1037 (Sup.Ct.1935); *Finn* v. *Brown*, 169 Misc. 436, 7 N.Y.S.2d 115 (Sup.Ct.1938); *Irving Trust Co.* v. *Deutsch-Atlantische Telegraphen Gesellschaft*, 22 N.Y.S.2d 581 (Sup.Ct.1940). In these cases typical New York bonds of German companies were involved. The Swiss Federal Tribunal, April 12, 1946, *Amtliche Sammlung*, 72 III 52, confronted with an entirely Czechoslovakian contract, recognized the discharging effect of a payment by the defendant company into the Prague court, but this payment was made under general civil law rather than under exchange control regulations.

As to the local creditor's claim against the foreign bank or office see *supra*, p. 450, n. 17.

42. See the writer's *Principles of Private International Law* (1943) 117 and 49 Yale L.J. 1027, 1031 (1940). For application of the "relativity" doctrine to gold clause cases, *supra*, p. 430.

43. Cf. *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 274, 14 N.E. 798 (1938).

44. *Gross* v. *Continental Caoutchouc*, *supra*, n. 17.

45. *Steinfink* v. *North German Lloyd S. S. Co.*, 176 Misc. 413, 27 N.Y.S.2d 918 (Sup.Ct.1941); *Eck* v. *Nederlandsch Americaansche Stoomvaart Maatschappij*, 183 Misc. 691, 52 N.Y.S.2d 367 (Sup.Ct.1941), with numerous references, especially in the dissenting opinion (by Eder, J.), to other ship passage cases. See also Freutel, *supra*, p. 455, n. 38, at 51. Among the cases discarding exchange control is *Rosenblueth* v. *N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 27 N.Y.S.2d 922 (Sup.Ct.1941), *aff'd without opinion*, 262 App.Div. 1002, 30 N.Y.S.2d 843 (1941), *leave to appeal denied*, 263 App.Div. 708, 31 N.Y.S.2d 666, the only pertinent case decided by the Appellate Division.

foreign law including its exchange control provisions, as a law of the place-of-performance or as the proper law of the contract.

The "contact" doctrine was explicitly employed in this connection by the Swiss Federal Tribunal.[46] Speculators had bought German bonds in a market depressed by German exchange control, and then brought a suit in Switzerland against the German debtors. The question arose whether in this situation resort to the public policy concept was warranted. The Swiss Federal Tribunal did not insist on the fact that the plaintiff tried to make a speculation good by means of the suit. Instead the court inquired into the contacts of the loan with the forum. One-fifth of it had been placed in Switzerland. Although there was no Swiss place of payment or of collection, the court deemed the contact sufficient to justify resort to public policy. The court declined to discriminate among the bondholders according to the time of acquisition of the bonds, since such discrimination would result in breaking up the bearer clause of the bonds; a reasoning in harmony with the dominant doctrine in respect to multiple-currency bonds [47] which the bonds here considered ordinarily are. The court reserved the right to refrain from the use of the public policy concept in cases where a sufficient contact of the loan with Switzerland was lacking.

Recognition was definitely the proper solution in certain much-discussed German cases. After the outbreak of the Bolshevist revolution, many Russians, disregarding the stringent Bolshevist exchange control, delivered money to other Russians to have it taken abroad. The recipient usually gave the payor either a written promise to pay a certain amount of dollars in New York or a bill of exchange drawn on a New York bank. On suit brought by the promisee, the *Reichsgericht* held the contract good, obviously because of aversion to Bolshevist legislation.[48] This ruling, however, was later practically abandoned.[49]

In *Ginsberg* v. *Canadian Pacific Steamships Ltd.*, 66 Lloyds L.Rep. 206, 215 (K.B.1940), likewise a ship passage case, judgment went to the plaintiff, a German refugee. But this was an English contract; the court also interpreted exchange control law restrictively.

46. Judgment of Feb. 1, 1938, *Amtliche Sammlung* 64 II 88, 104.

The "contact" theory does not mean, of course, that local creditors should win where foreign creditors would lose. The criteria are objective. This fact was misunderstood by Superior Court Zurich, Sept. 13, 1940, *Blätter für Zürcherische Rechtsprechung* 1941, 165, and Commercial Court Zurich, Dec. 10, 1940, *Schweizerische Juristen-Zeitung* XXXVIII (1941), 33.

47. *Supra*, p. 391.

48. Judgments of Oct. 3, 1923, *R.G.Z.* 108, 241 (French tr. in *J.D.Int.*,

49. See page 473.

In addition to the relativity of public policy, there is another reason possibly conducive to recognition of foreign exchange control. An English case, *Ralli Bros.* v. *Compañia Naviera Sota y Aznar*,[50] though not concerned with exchange control, is illustrative, and has sometimes been cited in this matter. A Spanish shipowner sued his English charterer for the full freight payable in Barcelona, notwithstanding the fact that the freight exceeded the legal maximum prescribed by a Spanish law, under penalty to both parties. The claim was dismissed. Afterwards in *Kleinwort Sons & Co.* v. *Ungarische Baumwolle Industrie Actiengesellschaft*, the Hungarian defendant company was ordered to pay despite the Hungarian exchange control to which it was subjected.[51] The *Ralli* case was distinguished on the weak ground that it

1924, 1077), and March 12, 1928, *J.W.* 1928, 1196; similarly App. Berlin *(Kammergericht)*, April 1, 1926, *J.W.* 1926, 2002. The *Reichsgericht* asserted that the prohibition ordained by the Russian government rested on principles of economic and social policy which were "state-socialist" (*staatssozialistisch*) and incompatible with German policy. However, Germany herself had at that time enacted similar provisions. Act of Feb. 3, 1922, *R.G.Bl.* 1922, 195. Furthermore, the court read into the contract an implied agreement that the place in which the promisor first settled after his flight from Russia, should be the place of payment. The place being Berlin the court in addition to the public policy argument, applied German law to the contract. This theory of the court furnishes an instructive list of judicial errors. (1) The implication by the court was arbitrary. (2) Parties cannot escape a prohibitive and punitive law by declaring that their contract should be subject to a foreign legal system. (3) One cannot have a "homeless" contract, the law of the contract to be determined at some indefinite future time.

It is striking that non-German courts for various reasons have reached the same result as the *Reichsgericht* had originally done: App. Paris, June 30, 1933, *J.D.Int.*, 1933, 963, on the basis of the French "territoriality" doctrine; Superior Court of Zurich, Sept. 1, 1925, *Blätter für Zürcherische Rechtsprechung*, 1927, 132, because the Swiss Government had not recognized the Soviets; Zurich Cass., March 1, 1926, *ibid.*, 1927, 136, on the ground that the litigated transaction did not violate Swiss public policy (the real question was whether the Soviet exchange law did so). In *Katz* v. *Fischel*, 174 Misc. 589, 21 N.Y.S.2d 572 (Sup.Ct., 1942), the violated foreign exchange control law—it was the German—was not mentioned; only the defense of usury was raised. All these cases imply concealed smuggling aspects. *Infra*, p. 485.

For a discussion of the problem see Neumann, *supra*, n. 1, at 127, who also lists a number of comments by German writers.

49. App. Hamburg, May 16, 1929, *Hanseatische Rechts- und Gerichtszeitschrift* 1930 B 743, and, through a different interpretation of virtually identical facts, *Reichsgericht*, Dec. 13, 1929, *Warneyers Rechtsprechung* 1930, 78.

50. [1920] 2 K.B. 287 (C.A.1919).

51. [1939] 2 K.B. 678 (K.B.), *supra*, ns. 19, 23.

involved a foreign (Spanish) place of payment. Still, there were weightier reasons than this. The Spanish maximum freight regulation was not—as is exchange control—by its very terms directed against foreign countries, nor did it involve the discriminatory feature of the license system. Therefore, it did not constitute in any comparable way a challenge to the public policy of other countries. And—to leave aside public policy—the plaintiff, though subject to Spanish jurisdiction, committed or prepared by this very suit, an act, punishable under Spanish law. Under such circumstances he could not be allowed to have his way. In other words, though there is no objection to declaring a foreign defendant liable for payment in the teeth of foreign exchange control, a foreign plaintiff cannot be permitted to misuse the forum for transgressing the laws of his own country.

For similar reasons a foreign defendant cannot be ordered to violate the laws of his country by positive action. This viewpoint —relevant possibly to the *Ralli* case also—is important for an explanation of another English case, *De Béeche* v. *The South American and Chilean Stores*.[52] The plaintiff, a Chilean citizen living in Paris, had leased property situated in Santiago de Chile to the defendant English companies, the rent to be paid in pounds sterling under a provision that "payment shall be effected . . . in Santiago de Chile on the first day of each month by first class bills on London." After the making of the contract, Chilean exchange control legislation was enacted which made the giving and taking of foreign bills dependent upon a permit of the Bank of Chile. When the permit was denied the lessees refused to comply with the demands of the lessor for the agreed bills of exchange. The lessor brought suit in England claiming, apparently as damages, £53,359, the amount of the arrears. The claim was dismissed because it had become impossible for the defendants to perform their contract without violating the Chilean law and rendering themselves subject to penalty. It has an important bearing on the case that this was not a simple action for debt. The plaintiff had insisted upon the defendant's handing over in Santiago, bills drawn on London, action punishable by law; the claim was based upon non-compliance with this particular demand. Such a cause of action the court was unable to uphold. In a connected case [53] the Court of Appeal pointed out that under the contract at bar payment was not to be made "from anywhere in the world," but exclusively by "an option of remission to

52. [1935] A.C. 148 (H. of L. 1934).

53. *St. Pierre* v. *South American Stores*, [1937] 3 All.Eng.Rep. 349, 356 (C.A.1937).

Europe from Chile." This interpretation, whatever its merit, constitutes one of the operative elements of the decision and justifies it because remittance could not be made without violating Chilean penal law.

All considered, not even under the public-policy doctrine, and still less in the absence of that doctrine, is recognition of foreign exchange control law barred under all circumstances.[54] Moreover, the Bretton Woods agreements have somewhat enlarged the field of recognition.[55]

V. Public International Law and Exchange Control in General

Public international law is no bar to exchange restrictions.[56] Nor do the typical treaties of commerce stand in their way. To the extent that the treaties grant the citizens of the cocontracting state "national treatment" with regard to "protection of property," "free disposal of property" and the like, they do not furnish any exception to the introduction of exchange control inasmuch as the control applies also, and even primarily, to nationals.[57] Nor is exchange control incompatible with the most-favored-nation clause. This needs no explanation. International arrangements threatening disadvantages in case exchange control is instituted are extremely rare.[58]

The real problem lies in the administration of exchange control. The assertion—often heard[59]—that control measures must not be "discriminatory" is tenuous. That control means, in the first place, allocation of scarce foreign exchange for the necessary im-

54. The Swiss Federal Tribunal, July 7, 1942, *Amtliche Sammlung* 68 II 203, in a case governed by American law, disregarded German exchange control on the ground that the latter was not recognized by American courts. This was too sweeping a statement.

55. More on this *infra*, p. 541.

56. *Werfel* v. *Zivnostenska Banka*, *supra*, n. 30; Opinion in *Malamatinos* case, F. K. Nielsen, *American-Turkish Claims Settlement* (1937) 603.

57. In a criminal case decided by the *Reichsgericht*, March 2, 1933, *Entscheidungen in Strafsachen* LXVII 130, the defendant, a British subject, invoked the "free-disposal-of-property" language of the Anglo-German commercial treaty of 1924 in order to escape punishment under the German exchange control law. The court disposed of the defense on the ground that a German court had to apply the later enactment, namely, the exchange control law of 1931.

58. The German-Belgian treaty of 1929, League of Nations, *Treaty Series* CIV 202, discussed *infra*, p. 500, provided that if Germany should suspend transfer of her dues, she would have to make equivalent deliveries in kind.

59. Pertinent statements of the United States Government or its officials are listed by Hyde, *International Law*, I (2d ed., 1945) 691, 692.

ports. Such a procedure is bound to bring about differentiation, especially through import restrictions, toward the country of the "scarce currency." Restrictions to safeguard a country's balance of payment, however, constitute acts of "self-preservation" legitimate even in the teeth of a most-favored-nation clause.[60] The situation is otherwise where the differentiation is not justified by economic necessity,[61] and takes on an arbitrary or offensive character—a hypothesis not easy to prove.[62] The whole problem definitely invites negotiation and amicable settlement.[63] The Geneva General Agreement on Tariffs and Trade,[64] and the Havana Charter of the International Trade Organization [65] have undertaken to solve it within the framework of international trade organization. No member shall institute import restrictions except to the extent necessary to forestall the imminent threat of, or to stop a serious decline of its monetary reserves, or, in case the reserves are very low, to achieve a reasonable rate of increase. This basic rule is then elaborated on a large scale in terms of trade regulations and procedural safeguards beyond the scope of monetary disquisition.

Introduction of exchange control may evoke repercussions upon international agreements other than treaties of commerce. For instance, a number of European countries, among them Germany, have concluded conventions on reciprocal enforcement of judgments. When Germany in 1931 initiated exchange control,

60. A declaration of the Department of State of 1932, Hyde, *supra*, n. 59, at 691, makes the point that the granting of "priorities of right" under exchange control is unobjectionable internationally. The most-favored-nation clause was not expressly referred to. In the United States-Argentine Trade Agreement of 1941, *Executive Agreement Series* #277 Art. XI (2) the most-favored-nation is expressly modified by the recognition of Argentina's right to impose quantitative restrictions against goods from the United States in order to "maintain the exchange value" of her currency.

61. Doubts have been raised regarding priorities in the payment of existing debts, Hyde, *op. cit.* 692, but a serious shortage of foreign currency may offer a valid excuse even in this case.

62. In 1921 the United States Government protested a decree of the Ecuadorian Government, fixing an arbitrary dollar rate, as "bringing about repudiation of indebtedness due to American citizens." Hackworth, *Digest of International Law*, V (1943), 616. The report is too scanty to allow the passing of judgment on the case. On the obnoxious exchange control practices of the Hitler government see *supra*, p. 453.

63. An example is the United States-Swedish understanding of June 25, 1947, *Dept. of State Bulletin* XVII (1947), 42.

64. *United Nations Publications* 1947 II 10, Arts. 12, 14, 15.

65. *U.S. Dept. of State Publications* 3206, Chap. IV B.

transfer to Switzerland of sums paid in Germany on Swiss judgments was no longer assured. It seems that the change did not vitiate the agreement with Germany.[66]

International *regulation* of exchange control, which has become quite common since World War II, requires special examination.[67]

Section 33

EXCHANGE CONTROL FROM WITHOUT

(B) SPECIAL PROBLEMS

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I. Local Transactions Concerning Foreign-Controlled Funds

Local transactions concerning foreign-controlled funds have been litigated repeatedly before local courts. The clear trend of the courts is to deny, on ground of public policy or similar formulae, the foreign exchange control any effect within the local area. Thus a Swiss firm had assigned to another Swiss firm a debt against a German firm, without the permit required by the German law which was applicable to the case. The Swiss Federal Tribunal held the assignment good because German exchange control was not binding upon Swiss courts; and the court held immaterial even the fact, indicative of a questionable transaction, that the plaintiff had bought the debt at 30–40 per cent below the face value.[1] This theory was followed in a case where a German creditor in Germany had assigned his debt against a Swiss debtor to a Swiss assignee.[2] French courts likewise held local transactions valid under more complex circumstances. The holder of a German mark account sold it in France to a French firm which intended to use it for the payment of its mark debts there. When the account was seized by the German authorities

66. This view was taken by the Swiss Federal Tribunal, March 6, 1936, *Journal des Tribunaux* (Geneva), 1939, I 28, and more explicitly, by the *Cour de Justice* (highest Geneva tribunal), Sept. 16, 1938, *ibid.*, 22.

67. *Infra*, secs. 36 to 38.

1. Swiss Federal Tribunal, Oct. 8, 1935, *Amtliche Sammlung* 61 II 242.

2. Swiss Federal Tribunal, Feb. 19, 1936, *Amtliche Sammlung* 62 II 108.

the seller was held liable to refund the purchase price because he was supposed to have tacitly guaranteed that the German authorities would grant the license.[3] The same result was reached in a case where a French bank had sold to a French firm, debtor of a German firm, "inland marks" to be paid to the creditor in discharge of the debt. The bank forwarded the amount owed the creditor through an agent operating in Germany under a fictitious name, thus violating German exchange control. The manoeuvre was discovered and the money confiscated by the German authorities. The Court dismissed the bank's claim for the purchase price so that the bank was made to bear the entire loss.[4] The Court's theory was not so much based on a tacit guarantee, as on the fact that the bank had not fulfilled its obligation to discharge the debt of the French firm. While a certain acknowledgment of German exchange control appears in the Court's refusal "to give any recognition to fraudulent transactions," the sale was not deemed invalid.[5]

In general, it would seem more proper to deny recognition to any transaction in which smuggling features are evident—not because foreign exchange control law must be protected, but because of the immoral character of smuggling.[6] This view, however, presupposes the control to remain within the ambit of reasonable protection of the national economy. The situation is different where exchange control is actually used, as it was used by the Hitler régime against its victims as a measure of confiscation and starvation. "Smuggling" may then amount to a legitimate self-defense.[7] Ordinary smuggling transactions against exchange

3. App. Colmar, Dec. 9, 1938, *Bull. I.I.I.* XLI (1939) 59. A guarantee is void however where it is evidently aimed at aiding a smuggling transaction. *Hesslein* v. *Matzner*, 19 N.Y.Supp.(2d) 462 (City Ct. N.Y., 1940) [place-of-performance theory].

4. Judgment of March 26, 1936, *J.D. Int.* 1936, 931. The rule was followed in the judgment of the same court, Dec. 8, 1936, Sirey, *Chronique Hebdomadaire*, 1937, 6.

5. See the annotation by Tager to the judgment of March 26, 1936, *J.D.Int.* 36, 935. Niboyet, *Revue Critique de Droit International* 1936, 490, goes too far in interpreting the judgment as an example of international collaboration in the field of exchange control. A clear theory underlies App. Colmar, March 11, 1938, *Revue Juridique d'Alsace et de Lorraine* 1938, 511, denying the effect of discharge to a payment made in Germany by a debtor (apparently French) to a German creditor, through remittances forbidden by German exchange control. The court laid the emphasis on the fact that the relevant events had occurred in Germany.

6. Exchange control laws are not revenue laws the extraterritorial enforcement of which is precluded by an old rule, *supra*, p. 463, n. 14.

7. The fact that an emigrant from Germany by a sworn statement had

control of foreign currency have been held void by an American [8] and an Austrian [9] court. Presence of the exceptional circumstances indicated above is suggested by a French case in which a Frenchman undertook to procure for a German emigrant effects left by the latter in Germany. The agreement was held valid.[10] Some Swiss courts have gone far with respect to local transactions, in disregarding intentional violations of foreign exchange control;[11] this has been done sometimes on the basis of the rather gratuitous hypothesis that the German authorities might have consented to the transaction.[12]

II. Sureties for Debts under Foreign Exchange Control

In international finance, creditors frequently protect themselves against the debtor's failure by procuring sureties or guarantors outside the debtor's country. A special problem of foreign exchange control arises from that practice.[13] When the debtor's

there violated an exchange control rule was not considered "moral turpitude" which would have barred his admission to the United States. 39 Op.Atty.Gen. 215 (1938).

8. *Hesslein* v. *Matzner*, 19 N.Y.S.2d 462 (City Ct., 1940) [place-of-performance theory].

9. Supreme Court of Austria, Feb. 9, 1937, *Die Rechtsprechung* 1937, 82. The court emphasized the fact that the nullified transaction was undertaken "for profit reasons."

10. App. Colmar, Feb. 16, 1937, *J.D. Int.* 1937, 784, attributing a "purely political character" to the German prohibition. The emigrant, it is true, had to bear the burden of the court's theory since he had to compensate the French agent for a fine imposed upon the latter by the German authorities and for other costs.

The same court had previously declared valid a promissory note signed in France by a Frenchman with intent to violate German exchange regulations. Judgment of June 24, 1932, *Sirey* 1934 II 73 (with annotation by Niboyet).

11. Swiss Federal Tribunal, Sept. 28, 1938, *J.D.Int.* 1939, 192 [A Czechoslovakian had agreed with a Swiss firm to make, for the latter, a payment of "inland schillings" in Austria contrary to Austrian exchange control.] However, Swiss authorities are not obligated to give aid to transgressors. Federal Tribunal, March 23, 1933, *Amtliche Sammlung* 59 II 138. *J.D.Int.* 1939, 486 [Austrian banknotes hidden by an Austrian in a compartment of a train coming from Austria; discovered by Swiss railway official and delivered to Austrian officials; no liability of the railway].

12. With the same result as in the case of the first Colmar judgment in n. 10 [the agents in the Swiss cases were Swiss banks]. Commercial Court Zurich, March 9, 1934, *Blätter für Zürcherische Rechtsprechung* 1935, 135, *aff'd* by Swiss Federal Tribunal, July 10, 1934, *ibid.* 140; and of May 8, 1935, *ibid.* 140; App. Basel, March 1, 1935, quoted in *Die Rechtsprechung* (Vienna) 1937, 85 ann.

13. See the informative article of Domke, "Les garanties de tiers dans les emprunts internationaux," *Revue de Science et de Législation Financières* 1936, 598.

country under the pressure of emergency forbids the transfer of funds, the sureties, of course, seek to avail themselves of the transfer prohibition as a defense. In 1925 a Swiss bank had guaranteed the debt of a German firm to a Swiss company. In a suit on the guaranty, the Swiss Federal Tribunal decided against the bank which had pleaded the German exchange control legislation.[14] The court observed that a Swiss creditor of a German debtor, by obtaining a Swiss guarantee obviously wanted to protect himself not only against the debtor's insolvency but also against any other risks to which the debt might be subject in Germany. Those risks included the possibility that Germany's political and economic condition might make necessary legislation adverse to the rights of foreign creditors. The argument is convincing and is applicable in the great majority of surety cases, regardless of the creditor's residence in the forum.[15] However, a Swiss law of December 16, 1941,[16] has changed the rule. A surety can now set up as a defense foreign exchange regulations imposed upon the main debtor unless the surety has waived the defense.

The Austrian Supreme Court, in the case of an Austrian creditor, decided against the surety,[17] but held for an Austrian surety against a non-Austrian creditor.[18] In the former case involving Hungarian exchange control, the court remarked that foreign exchange control is aimed at protecting the budget of the foreign state, and does not affect the privity between creditor and debtor.[19] The court, citing the Austrian Civil Code and quoting a lead-

14. Judgment of Sept. 18, 1934, *Amtliche Sammlung* 60 II 294. The court was troubled by the question whether the German rule was substantive or procedural but rejected it anyhow for reasons of public policy. Later the court took a different view in the case of clearing agreements, intimating that its former ruling was questionable. *Infra*, p. 520, n. 33.

15. The proper law governing the suretyship may differ from the proper law governing the main debt. Rowlatt, *Principal and Surety* (3d ed., 1936) 64; Batiffol, *Conflits de Lois en Matière de Contrats* (1938) 423. For instance, sureties have been denied the benefit of a moratorium granted to the foreign debtor in the country of his domicile. App. Hamburg, Feb. 24, 1915, *Hanseatische Gerichtzeitung* 1915, 101; July 7, 1915, *ibid.*, 1915, 238. Under American law sureties in war time were held liable to pay interest although interest did not run against the debtor, who was an alien enemy. *Paul* v. *Christie*, 4 Harr. & McH. (Md.) 161 (1798); *Bean* v. *Chapman*, 62 Ala. 58 (1878).

16. Swiss *Obligationenrecht*, 501 IV as amended.

17. Judgment of Sept. 5, 1934, *Die Rechtsprechung* 1934, 178.

18. Judgment of April 24, 1936, *Die Rechtsprechung* 1936, 146.

19. This argument suggesting, perhaps, a procedural conception of exchange control, disappeared in the 1936 case.

ing German writer, declared in general terms that foreign legislation affords no defenses to the surety. In the second case, involving a German creditor and German exchange control, the court read the opposite rule into the German law governing the surety contract, although it was not supported by any German case and was at variance with the views of the German writer cited in the previous judgment. There is not much force in these arguments, *pro* and *contra*.[20]

Related problems have appeared in international credit insurance and elsewhere. A policy sold by a French company purported to protect the insured, a French firm, against definitive losses they would suffer from insolvent customers. A Hungarian customer, although not insolvent, was prevented, by the intervention of the Hungarian exchange control, from making full payment. The Appellate Court of Paris held the insurance company liable to indemnify the insured firm; a questionable theory considering the fact that the risk of exchange control differs from insolvency risk.[21]

III. Valuation of Controlled Foreign Money

A problem already touched upon, namely, how to evaluate controlled foreign currency is one of the most urgent and at the same time one of the knottiest of monetary law. Actually, wherever exchange control exists, governments have established official rates for the handling of their currency. These rates while unilateral, in themselves are in the absence of free markets generally quoted and employed in other countries, though they are often greatly over-valued.[22] The resulting difficulties were first illuminated in an English case, *Arcos Ltd.* v. *London & Northern Trading Co. Ltd.*,[23] decided by Mr. Justice MacKinnon. The plaintiff had a claim of 240,000 rubles for damages inflicted on it in Russia through a breach of contract on the part of the defendant. Conversion into pounds sterling was demanded at the official Russian rate of 7.42 rubles for a pound. In black markets in

20. As to mortgages on local real property securing debts under foreign exchange control, *supra*, p. 469; as to guaranteeing the grant of license, *supra*, p. 460.

21. App. Paris, Nov. 8, 1935, *Gazette des Tribunaux*, Recueil 1935 II 472.

22. For an example see H. E. Ellis, *Exchange Control in Germany* (1941) 273, demonstrating the official overvaluation of the German mark. The hardships imposed upon American diplomatic officials in Soviet Russia through the overvaluation of the ruble are illustrated by 38 Op.Atty.Gen. 71 (1934).

23. 53 Lloyds L.Rep. 38 (K.B. 1935). "Arcos" was the official commercial organization of the Soviets in England.

Germany, Switzerland and elsewhere, ruble notes were then obtainable at a much lower price, and in Russia itself English tourists making their purchases in certain stores, would officially receive goods worth many more rubles for their pounds sterling. The court felt that it could not rely on these inordinate situations. Like a wanderer surrounded by a swamp, and sighting a spot of firm soil, the court, with some effort, took refuge on the solid ground of the official rate for the conversion of the 240,000 rubles. This meant, financially, that the Russian government, through the *Arcos*, received a handsome amount of sterling which it never could have bought at a rate even nearly as advantageous.[24] Nevertheless, the judgment has much to recommend it. The court was correct in denying that the official rate was solely fictitious at that time. While there was no free market for rubles, the Soviet government was able to impose its rate, though within an uncertain and narrow range, upon banks and business men in transactions involving delivery or valuation of rubles.[25] Departing from this rate the court felt would envelop the judiciary in far-reaching problems of estimate, insoluble without a high degree of arbitrariness.[26]

The *Arcos* case started a line of decisions exhibiting a definite trend of the law. In *Graumann* v. *Treitel*,[27] a lawsuit between German emigrants, the court imposed upon the defendant the official rate of the mark under particularly trying circumstances. The same rule was applied by English[28] and several Ameri-

24. It is well understandable that the case should have met with criticism. See, *e.g.*, Mann, *supra*, p. 1, n. 1, at 50.

25. In the concession agreement between the Soviet Government and the *Lena Goldfields Co.*, which later became the object of a famous arbitral proceeding, the official ruble rate adopted by the agreement proved highly advantageous to the Soviets. The award is found in *The Times* (London) of Sept. 3, 1930.

26. On the valuation of the ruble see Hubbard, *Soviet Money and Finance* (1936) 131, 245, 331. On p. 131 Mr. Hubbard states: "Today it is simply fatuous to try to symbolize the value of the paper ruble in terms of any other currency." This is just as true today as it was then. Still courts cannot help "symbolizing" sometimes.

27. [1940] 2 All. Eng. R. 188 (K.B. 1940), *supra*, p. 466.

28. *Ginsberg* v. *Canadian Steamships, Ltd.*, 66 Lloyds L.Rep. 206 (K.B.1940); *Pyrmont* v. *Schott*, *infra*, p. 488.

In *"The Eisenach,"* 54 Lloyds L.Rep. 354 (Adm.Div. 1936), where reward for the salvage of a German ship was sought, the court "because of the very fluid and uncertain state of the relative value of £ and Mark" resorted to conditions of the English ship market in determining the value of the salvaged ship. Application of the official rate to the mark price at which the ship was sold after salvage would have resulted in a higher amount.

can [29] decisions with regard to the mark and other currencies in one case (concerning rubles) also by a German court.[30]

In the field of taxation the official rate does not carry the same weight. Though an important case, *Eder* v. *Commissioner of Internal Revenue*,[31] has adopted the official rate (*in casu*: of Colombian money) at least as a point of departure, it is evident that very often the application of that rate would place an excessive burden upon the taxpayer. Unless the tax law itself prescribes rates for foreign exchange, the government has power, and is even obligated to adjust its tax claims to the real exchange situation without being hampered by the particular considerations by which courts feel fettered in the evaluation of foreign currencies. "Free market" rates of any kind may be considered by the tax authorities in this process, though they need not be followed strictly. The *Eder* case leaves the door open for such arrangements;[32] in fact, free rates have frequently been resorted to by the taxation authorities with the approval of the courts. Besides, taxation of assets couched in terms of foreign currency depends more or less on taxation principles of a non-monetary kind.[33]

29. *Gross* v. *Continentale Caoutchouc-Export, etc.*, 175 Misc. 496, 24 N.Y.S.2d 699 (Sup.Ct.1939) [mark]; *Kassel* v. *N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 177 Misc. 92, 24 N.Y.S.2d 450 (Sup.Ct., 1940) [marks]; *Rosenblüth* v. *N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 27 N.Y.S.2d 922 (Sup.Ct., 1941), *aff'd*, 262 App.Div. 1002, 30 N.Y.S. 2d 843 (1941) [the marks were on a blocked account, but this fact was disregarded by the court]; *Sabl* v. *Laenderbank Wien Aktiengesellschaft*, 33 N.Y.S.2d 764 (Sup.Ct., 1942) [Austrian schillings], citing the *Graumann* case. In *Strauss* v. *United States Lines Co.*, 40 N.Y.S. 2d 877 (Mun.Ct., 1943), the situation was peculiar in that the defendant company had been able to transfer its mark assets to this country at the official rate. Some cases seem to apply the official rate, but the theory used is not clear. *Buxbaum* v. *Assicurazioni Generali*, 33 N.Y.S. 2d 496 (Sup.Ct.1942), *aff'd without opinion*, 264 App.Dlv. 855, 36 N.Y.S. 2d 191, (1942) [Czechocrowns]; *Kaplan* v. *Assicurazioni Generali*, 34 N.Y.S.2d 115 (Sup.Ct., 1942) [English pounds]; *Stern* v. *Rona*, 217 App.Div. 600, 61 N.Y.S.2d 563 (1946) [Austrian schillings]; *Consular Court Shanghai, infra*, n. 52 [marks].

30. *Landesarbeitsgericht* (App. Labor Court) Berlin, Nov. 25, 1932, *Zeitschrift für Ostrecht*, 1933, 527.

31. 138 F.2d 27 (C.C.A. 2d, 1943).

32. *Edmond Weil Inc.* v. *Commissioner of Internal Revenue*, 150 F.2d 950 (C.C.A. 2d, 1946) [income tax; conversion of Brazilian milreis on the "commercial" rather than the higher "official" rate; character of the "commercial" rate not indicated]; *Morris Marks Landau* v. *Commissioner of Int. Revenue*, 7 Tax Court Rep. 12 (1946) [gift tax; South African blocked pounds; unofficial rate].

33. In income taxation the main criterion is whether the taxpayer is or is not a "dealer" in foreign exchange. *Frederick Victor &*

Valuation encounters particular difficulties where exchange control has resulted in "multiple-currency rates." Some customs cases have dealt with this problem.[34] Among them *Barr* v. *United States,* which, decided by the Supreme Court,[35] deserves special interest. In 1940, by virtue of English exchange control measures, the valuation of the pound sterling split into an official rate set by the English government and a "free" rate emerging for English accounts held by American residents. These accounts were restricted as to their English uses. When the Secretary of the Treasury, under the authority of the Tariff Act, adopted the official rate for customs on imports from England, an importer brought suit against the United States claiming the lower "free" rate. The Supreme Court held for the plaintiff on the ground that the "free" rate was a "true" rate and that application of the higher official rate was distorting and inflationary. Evidently the court allowed itself to be misled by reminiscences of conditions before 1931 when the "true" value of a currency emerged as a result of supply and demand in a free world market. In 1940 the "free" market for pounds was something different. Its object was underprivileged sterling accounts which necessarily reflected a value somewhat below the real value of the pound. The official rate, though perhaps over-valued, was nearer to the truth since it was related to pounds sterling of unlimited use.[36] While the "free-market" argument of the Supreme Court was ill-conceived, the "free" rate might well be helpful in other situations, for instance, in a valuation of under-privileged accounts. Such a rate may be far below the official one. When under the Hitler

Achelis v. *Salt's Textile Mfg. Co.,* 26 F.2d 249 (Conn., 1928). For further details see Mertens, *The Law of Federal Income Taxation* #28.82; Shepard, *Tax Law Rev.* I (1946), 232. English cases have held that an amount paid into a blocked account is not taxable income nor are the proceeds of a sale thereof or of bonds (scrips) delivered by the defaulting debtor in lieu of interest. *Inland Revenue Commissioner* v. *Paget,* [1938] 2 K.B. 25 (C.A. 1938); *Cross* v. *London and Provincial Trust, Ltd.,* [1938] 1 All. E. R. 428 (C. A. 1938). German law prior to World War II had developed a considerable body of rules on taxation of controlled foreign exchange. See Troeger, "Steuerrecht und Devisenbewirtschaftung" *Devisenarchiv* 1938, 569, 607.

34. A Treasury Decision of May 22, 1948, 13 Fed. Reg. 2771, evaluating the lira for customs purposes, is an example. Both the "official" and the "free" quotations of the lira were taken into account as well as the pricing of the type of goods involved (Italian woolen products).

35. 324 U.S. 83, 65 S.Ct. 522, 89 L. Ed. 765, (1945). The case has been discussed by the writer in "The pound-dollar ratio before the Supreme Court of the United States: Barr v. United States," 45 Col. L. Rev. 412 (1945).

36. See the writer's article in n. 35.

régime "Jewish-emigrant-accounts" had been emasculated to such an extent that they had no market at all, American courts were justified in assessing their value as zero regardless of the "official" rate of the mark.[37]

The whole problem of valuation under exchange-control conditions has been greatly eased through the establishment of "par values" by the International Monetary Fund. They will widely replace the "official values" of the past, but they have not eliminated the basic problem entirely. Though they are likely to be resorted to judicially, they are not binding upon the courts.[38] Still less are they binding upon tax authorities.[39] Also, there exist numerous currencies without "par values." [40] Nor are the Fund regulations concerned with the valuation under multiple currency rates. The Geneva General Agreement on Tariffs and Trade [41] and the Havana Charter of the International Trade Organization [42] propose an international regulation of this particular conversion problem within the ambit of those conventions.

IV. Irrepatriable Currencies

A grave disturbance of the international monetary situation results from the frequent prohibitions against reimporting the local currency. The prohibitions render the locked-out coins and notes irrepatriable except for the small amounts ordinarily allowed to incoming travelers. Only by way of smuggling can they be brought back in sizeable amounts. Any trading in such currencies must rely on the collaboration of smugglers. This condition will, of course, heavily depress prices in the "black" currency markets.[43] If we call "O" the country of origin, and "C" the

37. *Zimmern* v. *N. V. Nederlandsch Americaansche Stoomvaart Maatschappij*, 177 Misc. 91, 28 N.Y.S. 2d 824 (Sup.Ct. 1941); *Halpern* v. *Holland America Line* (Mun. Ct., N.Y., 1941), Am. Maritime Cases, 1942, 786. In a setting not involving "Jewish-emigrant-accounts" the value of the reichsmark was assumed to be zero in *Sun Insurance Office Ltd.* v. *Auraca Fund*, 84 F. Supp. 519 (D.C.Fla.1949) and 5 per cent of the official value in *Freund* v. *Lacnderbank*, N.Y.L.J. June 29, 1949, p. 2289 (Sup.Ct.) ann. by Cohn 3 Int.L.Qu. 99 (1950).

38. *Infra*, p. 535.

39. *Infra*, p. 527.

40. Clearing rates—*infra*, p. 577, —may sometimes be helpful in the process of valuation. Cf. Swiss Federal Tribunal, June 27, 1946, *Amtliche Sammlung* 72 III 100 [German-Swiss clearing agreement].

41. *Dept. of State Publications* No. 3229, Art. VII 4(c).

42. *Dept. of State Publications* No. 3206, Art. XXXV 5(c).

43. Regarding the foreign depreciation of the dollar during World War II see Commerce Clearing House, *War Law Service*, #14641 (Treasury Press Release No. 41 of Oct. 16, 1942).

country of circulation, debtors in "C" obligated in terms of "O" currency will quite naturally try to exploit the situation by tendering to their creditors irrepatriable and cheap "O" currency in discharge of their debts. Is such a tender good?

The question has been negatived on the ground that "O" by prohibiting the reimport of "O" money, has deprived it of its legal tender quality. The answer can hardly be accepted. The "O" money might be legally reimported within the traveler's allowance, or with permission of the "O" government, but even when smuggled in and returned into circulation, its recognition as legal tender is imperative in the interest of the public. In fact, a number of "C" courts—the Privy Council in *Marrache* v. *Ashton*,—a Gibraltar case [44]—, French,[45] Dutch,[46] Swiss [47] courts, and to some extent an American [48] court—have all decided in favor of the debtor owing "O" money; there was also an "O" (actually a German) court which reached the same result.[49] Some courts have stressed the point that the place of payment was in "C" [50] but under the theory adopted by the courts this prerequisite would appear redundant.

However, the conclusion reached by the courts is most unsatisfactory. The "O" debtor is under a duty to procure "O" money of

44. *Marrache* v. *Ashton*, *Marrache* v. *Onos*, [1943] A.C. 311, commented on in 59 L.Q.Rev. 301 (1943) and by Mann, "Problems of the rate of exchange," 8 Mod.L.Rev. 177, 184 (1945).

45. App. Paris, Dec. 16, 1937, in Voet and Erlanger, *Paiements en France de Créances Allemandes en Billets Reichsmark* (1939) 5, with the decision of first resort; Trib. civ. Seine, July 10, 1937, *ibid.* [German-mark creditor]; Trib. civ. Seine, Nov. 16, 1939, *Gazette du palais* of March 10, 1939 [German-mark creditor]; Trib. comm. Seine, Nov. 16, 1938, *D. H.* 1939, 63 [debtor a German subsidiary in France]; Trib. comm. Draguignan, Jan. 10, 1939, *Gazette du Palais* of April 21, 1939.

46. App. Hertogenbosch, Jan. 11, 1938, *Nederlandsche Jurisprudentie* 1938, 1024.

47. Commercial Court Zurich, Oct. 5, 1937, *Blätter für Zürcherische Rechtsprechung* 1938, 360.

48. *Herzfeld* v. *National City Bank of New York*, 175 Misc. 534, 24 N.Y.S.2d 69 (City Ct., N.Y., 1940). The case however, lacks general significance because the court assumed—on questionable grounds, incidentally—that the defendant bank, being the creditor, had itself demanded payment in irrepatriable money, namely in Belgian franc notes. The question of repatriability was not touched upon.

49. App. Karlsruhe, Sept. 26, 1940, *Deutsches Recht* 1941 A 209. The Dutch plaintiff had sued before in a Dutch court, demanding marks though he would have been entitled to guilders. For this reason he was bound to accept mark notes in Holland. The German court could have confined its argument to this point, but advanced instead a broad theory.

50. Especially the appellate courts of Paris and Hertogenbosch, *supra*, n. 45 and 46.

full value (or its equivalent in "C" money according to the official rate). The tender by the debtor of cheap black market money is not only a mockery from a financial point of view, but an insult because it suggests that the creditor might try his hand at the black market business. Such a tender should be considered as incompatible with good faith.[51] In fact, a few "C" courts—among them the American Consular Court of Shanghai,[52]—and one "O" court [53] have disapproved the tender of irrepatriable notes.

The Shanghai case is especially suited to demonstrate the unfairness of the consequences resulting from the dominant theory. An American on a trip through Germany had bought there various merchandise. She left Germany without paying but her creditor succeeded in having process served upon her in Shanghai, where she had to appear before the American Consular Court. She had the effrontery to tender irrepatriable German notes, but this application of the dominant theory did not meet with the approval of the court, which ordered her to pay the equivalent of the marks at the official rate in Shanghai dollars.

The *Marrache* case was concerned with irrepatriable Spanish peseta ("Franco") notes. The defendant, a Gibraltar resident, owed pesetas to the plaintiff, another resident there. He had not actually tendered irrepatriable peseta notes, but the court in converting the sum owed into sterling proceeded upon the theory that he would have been entitled to do so. By this method the court cut the amount adjudicated down to about one-third, the official rate being 53 pesetas to the pound sterling, whereas the court adopted the rate of 153 pesetas which one had to pay in Gibraltar and London for Franco notes there available. This "market" therefore was in reality a "black" market unsuited to serve a court as a basis for a judgment as its prices reflect the smuggling risk.[54] The acceptance of the lower rate is also out of line with

51. Conformance to *bona fides (Treu und Glauben)* has always been a dominant civil law principle in the interpretation of contracts and in the determination of the debtor's duties (see e.g. German Civil Code, §§ 137 and 242; Dutch Civil Code § 1374 par. 3.) Common law, too, demands "fair and reasonable" interpretation of contracts. *American Jurisprudence*, "Contracts," sec. 250.

52. Decision of Oct. 15, 1937, *J.W.* 1937, 711. The other decision is the one rendered by the court of Gibraltar in the *Marrache* case. The language of these two cases, it is true, suggests negation of the legal tender quality of the "O" notes.

53. App. Breslau, March 18, 1937, *Höchstrichterliche Rechtsprechung* 1938, No. 693.

54. The Gibraltar court, being nearer to the situation, remarkably refused to adopt the 153 rate. A minor point may be noted. A Gi-

the policy of the courts to choose the official rate for conversion purposes. As a matter of fact, in *Graumann* v. *Treitel*, the court, awarding the official rate for German marks, had held the lower prices of the London "market" for German notes irrelevant.[55]

Prior to *Marrache* v. *Ashton* the Privy Council had been concerned with the Gibraltar peseta situation in *Pyrmont* v. *Schott*.[56] The Spanish republic during its agony had in March, 1936, prohibited the importation of peseta notes of the Bank of Spain except on the basis of an official certificate (*guia*) which an exporter of notes received and which carried the right to reimport an equal sum in notes. The defendant, a Gibraltar Company, had borrowed in 1935 from the plaintiff, a Gibraltar resident, 500,000 pesetas. At maturity which occurred after March, 1936, the defendant tendered to the plaintiff notes without guia. The plaintiff's rejection of the notes was approved by the court, which gave judgment against the defendant in sterling at the official peseta rate. The adjudication was correct, but the court based it on the ground that the notes of the Bank of Spain were not legal tender under the Spanish law then in force. This argument came as a surprise. It had not been alleged by the plaintiff herself when she refused to take the notes. This fact in itself should have defeated the defense.[57] Obviously neither she nor her counsel thought of it. The court admitted that Spanish gold and silver coin were no longer in circulation when the debt matured. This meant that redemption of the peseta notes had been discontinued, leaving the Spanish people no choice but to accept bank notes in payment. Supposing the Court's statement on Spanish law to be correct,[58] the *cours forcé* had been introduced without statutory declaration, rendering the still unchanged gold-peseta rate illusory. It would have been more satisfactory to place the adjudication on the plain and incontestable fact that the debtor had defaulted by not having

braltar banker, testifying before the court on the Gibraltar trade in Franco notes, called this market "regular." The Privy Council in its opinion omitted the epithet "regular."

55. *Supra*, n. 27, at 200.

56. [1939] A.C. 145 (1938), commented on by Menard, *Revue Critique de Droit International* XXXIV (1939), 294. See also Cohn, *supra*, p. 461, n. 1, at 552.

57. *Supra*, p. 51. The plaintiff had only declared that she "could not deal with such a sum."

58. Within Tangier where the currency was Spanish, the legal tender quality of the peseta notes of the Republic had been repeatedly recognized by the (international) Mixed Tribunal of Tangier, Menard, *supra*, n. 56. Apparently, in the *Pyrmont* case the defendant failed to submit to the court the necessary information on the Spanish monetary situation, but only in part does this omission justify the court's reasoning.

tendered freely usuable peseta notes. However, this line of reasoning if adopted by the court would have been a crushing blow to the Gibraltar market in pesetas and indirectly to similar other markets of considerable financial importance. The *Marrache* and the *Pyrmont* cases steer clear of this.

The legal situation of irrepatriable money has been affected to some extent by bipartite conventions according to which paper money and subsidiary coins of the one country were not to be used in the other for purchases and other transactions enumerated by the treaties. Such provisions occurred especially before World War II in monetary compacts of which France or Germany was a partner.[59] French,[60] Belgian [61] and Dutch [62] courts have rendered decisions on questions resulting from such arrangements. The French decisions have a certain import on non-treaty cases because the courts—forgetful of their "territoriality" doctrine—developed a tendency to recognize the legal tender quality of foreign notes wherever recognition was not prohibited by treaty.[63] Even in the absence of express provisions, irrepatriable money may be unfit for payments as a result of a clearing treaty.[64]

V. Retaliation

Where in the relations between two countries one is on exchange control, the "free" country will be placed at a disadvantage. Payments will flow unimpeded from the latter to the former, but not in the reverse direction. This inequality invites retaliatory measures. The free country possesses a good weapon, if it is primarily the importing one. It may "impound" the sums due to the other country, and use the payments owed to sellers in the latter from its own importers to satisfy its citizens (or residents) who have debtors in that state. For this purpose importers, and other debtors, may be required to make payment into a special account in the country's central bank to be employed to satisfy

59. Cf. Silz, "Le payement en France des obligations en monnaie dirigée et controlée,' *J.D.Int.* 1939, 545, 554.

60. Trib. comm. Seine, Nov. 16, 1938, *D.H.* 1939, 63; Trib. civ. Seine, March 10, 1939, *Gazette du Palais* June 9, 1939; Trib. civ. Draguignan, *supra*, n. 45 (Italian-French treaty.

61. Trib. comm. Liége, Feb. 23, 1937, *Jurisprudence de la Cour d'Appel de Liége*, 1937, 224; Judge of Peace St. Gilles, Oct. 15, 1936, *Journal des Tribunaux Belges* 1937, 121.

62. Court Maastricht, Nov. 8, 1935, *Weekblad van het Recht* 1935, No. 12987.

63. Especially so, Trib. comm. Seine, Nov. 16, 1938 [marks] Trib. civ. Draguignan [livre] *supra*, n. 45, and Trib. comm. Seine, July 23, 1937 cited by Silz, *supra*, n. 59, at 547, n. 2 [marks]. The "territoriality" of the *cours forcé* did not cause any scruple to these courts. Cf. also Cohn *supra*, p. 461 **n. 1, at 563.**

64. *Infra.*

domestic creditors. Switzerland used this "compulsory clearing" method against Spain and Poland in 1936.[65] Purely political retaliation was intended by the compulsory clearing instituted in 1936 by Fascist Italy against the League powers which had put into force sanctions against Italy because of her aggression of Ethiopia.[66] Sometimes the mere threat of compulsory clearing has been sufficient to obtain concessions from the defaulting state. For instance, after Hitler— Germany had discontinued the payment of interest to foreign bondholders and English-German negotiations on the subject had failed, the English Parliament passed a Debts Clearing Offices and Import Restrictions [67] Act which did not become effective because Germany agreed to modify her exchange control in favor of English creditors. Similar developments have occurred in other cases.[68]

Because of its active balance of trade with Germany, the United States, when faced with Hitler's interdiction of transfers, was unable to resort to compulsory clearing. The Department of State in 1934 repeatedly and "vigorously" protested the actions taken by the German government, but with little success. The countervailing duties ordered against Germany in 1936 had a retaliatory character, but this was a pure tariff measure based on the fact that the German control devices resulted in "bounties" to German exporters.[69]

American retaliatory reaction was also brought about by the fact that the German transfer prohibition extended to inheritances, bequests and similar distributions to American citizens and residents. Thereupon, a Pennsylvania lower court in a trust case apparently denied remittance of an American bequest to a German beneficiary because of lack of reciprocity on the German side.[70] Only a few days later the German Ambassador submitted to the American Government a note to the effect that Germany

65. See Hug, "Das Clearingrecht und seine Einwirkung auf die vertraglichen Schuldverhältnisse" in *Zeitschrift für Schweizerisches Recht*, 1936, 397a at 401a. On conventional clearing see *infra*, sec. 36.

66. "Antisanctionist" decree (*decreto antisanzionista*) of Nov. 20, 1935, *Lex* 1935, 1448 applied by Ital. Cass., July 29, 1941, *Giurisprudenza Italiana* 1942 I (1) 13 [against England]; App. Genoa, Jan. 28, 1938, *Banca, Borsa e Titoli di Credito* (a periodical), V (1938) II 155 [against Belgium].

67. 24 & 25 Geo. V, c. 31 (1934). The Act gives a concise picture of a clearing setup. Its historical background is discussed by Harris, *Germany's Foreign Indebtedness* (1935) 60.

68. Harris, 64.

69. References *supra*, p. 454, n. 29.

70. *New York Times*, Dec. 13, 1938, p. 19. The decision is not on record. The appellate decision does not rely on reciprocity. *Re Hartmann's Estate*, 38 D. & C. (Pa.) 310 (1939).

would allow similar remittances in future.[71] Actually it was doubtful whether the court had power to establish the prerequisite of reciprocity, especially as the Treaty of Commerce with Germany grants "national treatment" to German citizens (a typical provision of commercial treaties).[72] For the same reason a state legislature cannot demand reciprocity in the teeth of such treaties.[73] The situation was met on proper and more secure grounds in 1939 by a New York enactment.[74] The latter authorized the Surrogate's Courts to withhold payment out of estates and to order instead payment into court for the benefit of the designee where it appears that he or she would not receive the benefit or control of the money or "for other circumstances" which would make the withholding desirable. This provision, keeping within the usual framework of trust and estate law, could not be questioned under the treaties of commerce. Actually it turns more against confiscatory interference by totalitarian régimes [75] though measures of exchange control and especially of compulsory rates of exchange may be an element thereof.[76]

71. *Dept. of State Bulletin* XIX (1938) 466.

72. The Treaty of Friendship, Commerce and Consular Rights between the United States and Germany of 1923, *Treaty Series* No. 725, Arts. I and IV is still in force. *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947).

73. The State of Oregon demands reciprocity for allowing foreigners to take personal property by inheritance. *Compiled Laws*, § 61–107. The burden of proof that reciprocity exists is upon the foreigner. *In re Brown's Estate*, 161 Ore. 503, 90 Pac.(2d) 484 (1939) [involving German distributees]. Similar statutes have been enacted, for instance, in California, *Probate Code*, § 259, and Texas, *Civil Statutes*, Art. 177. The provisions are unobjectionable where they do not conflict with treaties.

74. § 269 of the Surrogate's Court Act, as amended by Laws of 1939, ch. 343.

75. Considering the practices of the governments in question, payment to German distributees was barred in *In re Estate of Weidberg*, 172 Misc. 524, 15 N.Y.S.2d 252 (Surr.Ct., 1939); in *Matter of Muckl's Estate*, 174 Misc. 35, 19 N.Y.S.2d 1009 (Surr.Ct., 1940); and to a Soviet distributee, in *In re Landau's Estate*, 172 Misc. 651, 16 N.Y.S.2d 3 (Surr.Ct.1939). See also case in next note.

76. *Matter of Bold's Estate*, 173 Misc. 545, 18 N.Y.S.2d 291 (Surr. Ct. 1940) [distributee a Soviet citizen].

Section 34

WARFARE AND MILITARY OCCUPATION

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I. Wartime Law of Money in General

Money is considered "contraband" by international law—its importance in warfare is obvious. During the nineteenth century it was treated as "conditional" contraband, that is, subject to the rules on contraband only under certain conditions. In 1916 the Allied Powers declared it absolute contraband, a rule also adopted by Germany.[1] The new doctrine which also applies to money of a neutral is characteristic of the retrogressive trend of the international law on war.

Debts owed to residents or citizens of a belligerent are likewise the object of seizure. This principle has led to measures which bear a distinct resemblance to some features of exchange control. Debtors of enemies [2] are prohibited from making payment to the enemy or his agents. They may be compelled or entitled to disburse the sums due, with discharging effect, into the treasury of the belligerent.[3] Measures of this type taken in 1777 by Virginia against British creditors are the subject of an early decision of

1. Oppenheim, *International Law*, II (6th ed. by Lauterpacht, 1940), sec. 394(4). The same rule applies to gold. In the Dollfus case, *supra*, p. 67, n. 46, gold held by the enemy government was involved.

2. The ordinarily used term "alien enemy" has no definite meaning, except for statutory definition. Domke, *Trading with the Enemy in World War II* (1943) 63.

3. The details vary widely according to wars and countries. In World War II the Alien Property Custodian, whose office was created by Executive Order No. 9095, March 11, 1942, 7 Fed.Reg. 1971, issued the basic regulation by his General Order No. 20, Feb. 9, 1943, 8 Fed. Reg. 1780. At variance with American law, payment to the Custodian (for Enemy Property) was ordered by the British Trading with the Enemy (Investment) Order 1939, S. R. & O. 1940, 1113. Some Dominial Orders of the same type are listed by Domke, *supra*, at 165. The decisions of the Supreme Court of the Philippines of April 9, 1948, in *Haw Pia* v. *The China Banking Corporation*, 4 Decision (Law Journal) 274 (1948), and in *Philippine Trust Co.* v. *Araneta*, 5 *ibid.*, 202 (1949)—negating duress under military occupation—are illustrative.

the Supreme Court of the United States.[4] Theoretical discussions of the seizure of enemy debts were undertaken as early as the eighteenth century by Bynkershoek[5] and Vattel.[6] Under the Hague Convention of 1907 on the Laws and Customs of War on Land, which prohibits confiscation of private property by the occupant power,[7] seizure of debts must not amount to more than sequestration; final disposal is reserved to the peace arrangements.[8] "Cash" belonging to the enemy state, however, may be appropriated by the occupant.[9]

II. Counterfeiting of Enemy Money

All these rules are regular applications of the law of war. A more intriguing issue is the imitation of enemy money by a belligerent. Earlier in this volume[10] it was seen that the Middle Ages and later centuries did not recognize what one might call, roughly, a "copyright" in coins. Consistent with this tradition a belligerent who got hold of the enemy's dies was not blamed for utilizing them provided the standard of the coins was not altered.[11] But this restraint did not always prevail. For example, Frederick the Great used captured enemy dies to manufacture coins of a lower standard.[12]

The malpractice assumed much greater dimensions in the era of paper money as mass falsification became easier, less expen-

4. *Ware* v. *Hylton*, 3 Dall. (3 U.S.) 199, 1 L.Ed. 568 (1796). The Court held that under the American-British Peace Treaty of 1783 the debtor who had paid into the Virginia Treasury, could not invoke this fact against his British creditor. *Infra*, p. 568.

5. *Quaestiones Juris Publici* (1737) Book I, chap. 8.

6. *Le Droit des Gens* (1758) Book III, sec. 77. Vattel's discussion, however, is not very illuminative. Cf. the writer's *Concise History of the Law of Nations* (1947) 159.

7. Art. 46 of the Convention.

8. See, e. g., Treaty of Versailles, Part X, sec. 4, referred to in American-German Peace Treaty of 1921, *Treaty Series* No. 658, Art. II(1).

9. Oppenheim, *supra*, sec. 137. The Hague Convention, Art. 53, uses the term, "take possession of the cash . . . ." Money held by private banks cannot be so taken. During the Franco-Prussian War of 1870–71, the Germans seized silver coins in the amount of 5,690,000 francs held by the Strasbourg branch of the Banque de France, but after examination of the legal situation released the money as belonging to a private enterprise. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942) 52. The occurrence illustrates the change of times. Under the Hague Convention, Art. 52, money may be "requisitioned," Feilchenfeld, 38, 46, but there seems to be no evidence of such a practice.

10. *Supra*, p. 317.

11. Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2d ed., 1926) 148.

12. Lippert, *Internationales Finanzrecht*, II (2d ed., 1928), 798; *Luschin von Ebengreuth, l.c.*

sive, and more remunerative. The main motive of falsification was a desire to have convenient media of payment at hand for an occupation of enemy territory where the inhabitants were expected to take the bogus money in payment for goods and services. Another motive was the intention to dilute and undermine the enemy's monetary system by creating inflation.[13] As early as the Revolutionary War the Continental Congress complained: "Whereas large sums of Continental bills of credit have been counterfeited and issued by the agents, emissaries and abettors of Sir William Howe [the Commander in Chief of the English forces] . . ."[14]

In the War of Coalition against the French Revolution plans existed to attack the Republic from the monetary side; Goethe, who participated in the campaign as a civilian speaks of machinery for the printing of *assignats,* which the French emigres carried with them.[15] However, Napoleon I was the great master in the black art of forging enemy paper money. In the Franco-Austrian War of 1809 he put into circulation falsified Austrian banknotes, the amount of which is stated by one writer as 44 millions, and by another as 400 millions of florins.[16] After peace was restored Napoleon offered excuses and pledged destruction of the still existing counterfeits.[17] Yet before long he tried to employ the same weapon anew in the war against England[18] and under dramatic circumstances in the preparation of the war against Russia.[19] Another case, not so crude, occurred in the Ruhr invasion of 1930. According to the German *Reichsbank,* the French authorities, seized notes not yet fully printed and cut,

13. See Nys, *Le Droit International* III (1912), 219.

14. *Journal of Congress.* Dec. 19, 1777.

15. *Campagne in Frankreich 1792,* sub, "Der 13 October."

16. Nys 219.

17. *Ibid.,* 220.

18. Royaumont, "Napoléon faux-monnayeur," *Humanité Nouvelle* (a periodical) III 2 (1899) 9, 187, 296.

19. Lippert, *supra,* n. 42, at 799, giving further references. Rhodes, *The Craft of Forgery* (1934) 161, tells the amazing story of how in 1812 Pasquier, Prefect of Paris, arrested a gang of counterfeiters whose desperate and armed resistance had to be broken by a bloody struggle with the police. The gang had "presses of an excellent type, and plates which proved that Austrian and Russian notes were being produced in large quantities." As soon as the Minister of Police, General Savary, learned of the event, he ordered the release of the counterfeiters, who had been set to work at the command of Napoleon himself, the Russian notes having been intended for the financing of Napoleon's Russian campaign. Rhodes adds some other cases of counterfeiting for purposes of war. Unfortunately, he does not indicate the sources on which he relies.

in local branches of the Bank, and issued them after having added the missing letters and figures.[20] During World War II, the Germans flooded Italy with counterfeit dollar notes.[21] There are more reports of similar occurrences in recent times.[22]

Undoubtedly, the falsifications described are beyond the pales of international law and morality. This is evidenced by Napoleon's retraction toward Austria, as well as by the fact that the perpetrators never tried to justify their actions; they only tried to conceal them.

III. Money of Occupation [23]

Prior to World War I, the problem how to maintain monetary circulation in an occupied territory did not exist or was not sufficiently felt as to give rise to public discussion. The smaller size of the campaigning armies, the lesser intensity of warfare, the more limited duration of belligerent occupation, and a certain unfamiliarity with the potentialities of fiat paper money account for the earlier state of things. Generally, local money continued to circulate during the occupation. The occupant tried to obtain as much of it as possible by way of taxation, confiscation, and otherwise. The Hague Convention of 1907 is silent on the subject. It ordains that contributions shall be paid for "in cash" and if this is not possible that receipt shall be given and payment made as soon as possible (Art. 52). Where the "cash" should come from the Convention does not indicate. As late as the first phases of World War I, Germany as the occupant of Belgium and

20. Annual Report of the *Reichsbank* for 1923 (1924) 16. Schacht, then President of the *Reichsbank* offers considerable detail in his volume, *The Stabilization of the Mark* (1927) 62. These allegations have not been denied by French authorities or writers.

21. Statement by Under-Secretary of War Patterson, *New York Times*, Dec. 18, 1943, p. 10.

22. According to a report to the *New York Times* of February 22, 1948, p. 9, the German High Command in World War II, having captured at Dunquerque large quantities of English note paper, decided to counterfeit sterling notes. Krivitzki, *In Stalin's Secret Service* (1939) 116, gives a detailed description of counterfeiting allegedly done by the Soviets on a large scale in connection with what would now be called "cold" war. Krivitzki had been a high Soviet official.

23. A clear and well-reasoned account of this topic is presented by Feilchenfeld, *supra*, n. 9, at 70. The account is especially informative with regard to Belgian events during World War I, but otherwise overlooks much of the available material. The Treasury Department, through Mr. Paul, delivered, in September, 1943, a thoroughly documented opinion: "Legality of the Issuance of Allied Military Government Currency in Sicily." U.S. Senate, 80th Cong., 1st Sess., *Occupation Currency Transactions, Hearings before the Committee on*

Northern France relied on local currency.[24] The United States when occupying the Rhineland in 1918, did the same.[25] In World War II the money supply for the occupation of territories of Allied Powers was secured through arrangements with the Allied governments concerned.[26]

A new pattern was devised in World War I by Germany. Unable to obtain the needed currency from the Belgian Central Bank or the Belgian Government, the military authorities of the occupant conferred the right of emitting Belgian franc notes upon a private bank, the *Société Générale de Belgique* at Brussels, a measure to which the Belgian government willy-nilly consented.[27] The Germans followed a similar pattern in France only that the franc notes were issued on their demand by French municipalities proceeding on the basis of French legislation. That legislation required the consent of the French government for

Appropriations, etc. (1947) 73. The opinion is helpful far beyond its immediate purpose. Another valuable and detailed study of the subject at hand is Neumeyer, *Internationales Verwaltungsrecht* III (part 2, III; 1930) 245. Reference may further be made to Baron Nolde, "La monnaie en droit international public," *Rec.Ac.* XXVII (1927) 306; and to Lester, *International Aspects of Wartime Monetary Experience* (1944), a careful economic study. Popovics, *Das Geldwesen im Kriege* (1925) is concerned merely with the internal development of Austro-Hungarian currency and finance in World War I. Despite its broad title, the book has little relevance to the present discussion. Much material on the monetary events of World War II and their sequels is found in Fraleigh, "Acts of enemy occupation authorities" 35 Corn.L.Q. 89, 107 (1949).

24. On German occupation money in World War I, see Süss, *Das Geldwesen im Besetzten Frankreich* (1920); Lehnich, *Währung und Wirtschaft in Polen, Litauen, Lettland und Esthland* (1923); Koehler in *Wirtschafts-und Sozialgeschichte des Weltkrieges Deutsche Serie* (ed. J. T. Shotwell) vol. 1: *"Die Staatsverwaltung der Besetzten Gebiete; Belgien"* 108; and Durrenberger, *La Circulation Monétaire dans les Pays Occupés au Cours de la Guerre par les Empires Centraux* (thesis, Strasbourg, 1921).

25. American Military Government of Occupied Germany 1918–20, *Report of Officer in Charge of Civil Affairs* (1943) 223. The puzzling problem then arose whether under a statute of 1904, Rev.Stat. 3617, now 31 U.S.C. 484, which was not designed for war purposes, the occupation authorities had to turn over moneys received from the German Government to the Treasury in order to have it reappropriated by Congress. See *Report* cited above at 220.

26. *Annual Report of the Secretary of the Treasury* for 1944–45, pp. 97, 387.

27. As a reserve (coverage) for the new notes, German mark notes amounting to 1,600,000,000 marks were deposited by the German authorities with the Reichsbank. There is no such coverage in the case of "military" currency, *infra*.

the issuance. Such consent was lacking, but at least the government did not protest for a long time and the populace of the occupied areas had little scruples in accepting bills issued by their own municipalities.[28] The system based on cooperation between the occupant and the authorities of the occupied state, was no more than a remnant of former happier times. It was bound to collapse when mounting excesses and hatred on both sides made cooperation impossible.

There have been instances in which the occupant power supplied its own currency for defraying the costs of occupation,[29] but under modern conditions this will be an exception. Under international law the occupant is entitled to levy the costs of occupation upon the inhabitants of the occupied territory.[30] Advancing his own currency might increase the inflationary pressure upon the latter. A familiar expedient is the establishment of a special "military" currency for the occupied area, a procedure permitting the use of the local monetary unit.[31] The inscription of military currency ordinarily exhibits no promise to pay and no indication that

28. See the studies by Süss and Durrenberger, *supra*, n. 24.

Emission of municipal paper money occurred also in Lemberg (Lwow) during the Russian occupation of 1914–15, Cybochowski, "Die Besetzung Lembergs im Kriege 1914–15," *Zeitschrift für Internationales Recht* XXVI (1926) 459.

29. In World War I Austria-Hungary apparently managed to finance the occupation by her own currency. Kerchnawe, *Die Militärverwaltung in den von den Oesterreichisch-Ungarischen Truppen Besetzten Gebieten* (1928) 241.

For particular reasons the United States Army, when occupying North Africa, Sicily, and Italy in World War II first used a special kind of United States currency ("Spearhead Dollars"), *infra*, p. 500.

30. Hague Convention Respecting the Laws and Customs of War on Land, 1907, Art. 49; Feilchenfeld, *supra*, n. 9, at 41; Opinion of the Treasury of Dec. 1943 on "Authority to Establish Military Government, etc.", U.S. Senate, *Hearings*, *supra*, n. 23, at 84, 88.

31. The Allied military currency for Sicily and Italy was expressed in lire. Where the occupant uses his own monetary unit, he will frequently prescribe compulsory ratios between that unit and the local one. This happened, for instance, during World War I in Belgium where the German authorities imposed the pre-war ratio of 1 mark to 1.25 francs. In World War II the ratio of the Italian lira to the dollar of Allied Military Currency was fixed at 100:1, see Treasury statement in Spahr, *Allied Military Currency* (1943) 24. Ratios distorted in favor of the occupant—this was not the point in the Belgian situation—might be unlawful, but the significance of the question is limited since such a ratio would, more than anything, deter the population from accepting the occupation currency. The delicacy of the problem is well set forth by Kerchnawe, *supra*, n. 29, at 241. See also Lester, (*supra*, n. 23, at 16; id., "Exchange rate policy for liberated areas," *Free World* 1944, 161. On occupational currency in the Pacific *cf. Fed.Res. Bull.*1944, 233.

an obligation has been undertaken by the issuer.[32] In World War II the Allied Military Government was named at the top of the notes, but there was no mention of the United States or any other country, neither was there a signature. The legal idea behind was that the sovereign of the occupied country had ultimately to "redeem" the miltary currency, that is, to exchange it for regular national money. Generally speaking, the occupant is merely under the moral duty to see to it that this is adequately done, preferably through the peace treaty.[33] He will develop various administrative devices to impart actual purchasing power to military notes,[34] but the latter as such have no place on the liability side of his budget.[35] No "reserves" or other coverages are held by the occupant against the notes issued.

The power to issue currency forms part of the occupant's vicarious sovereignty rights. It includes necessarily the power to make such currency legal tender.[36] Debts incurred during or before the occupation are therefore validly discharged by payment in occupation money, "military" or other. Apart from considerations of international law, the de-facto-government character of the occupation authorities justifies this view.[37] The question becomes crucial if the occupied country is reacquired by its Sovereign. The courts of the former occupant will be willing to recognize the discharging effect of payments made in occupation money,[38] but that effect has also been recognized by courts of the reacquiring Sovereign.[39] This has been done especially by the Supreme Court of the Philippines in a carefully reasoned judg-

32. U.S. Senate, Hearings, *supra*, n. 23, at 95, 96.

33. Italy assumed responsibility for the Allied Military Currency by the Armistice of Sept. 29, 1943, Department of State, *Publication* No. 2669 [*European Series* 17], Art. 23. The burden on the Italian Government was alleviated by later arrangements. 17 *Dept. of State Bulletin* 371 (1947).

34. The American Government allowed American troops within certain limits to exchange Allied Military Currency for dollars. This measure, of course, did not amount to "redemption." U.S. Senate, *Hearings*, *supra*, n. 23, at 96.

35. See Treasury Report, *supra*, n. 26, at 393, and *infra*, n. 47.

36. *Supra*, pp. 41, 45.

37. *Supra*, p. 6.

38. *Reichsgericht*, April 22, 1922, *J. W.* 1922, 1324; Dec. 20, 1924, *R. G.Z.* 109, 357; App. Braunschweig, Nov. 8, 1921, *Rechtsprechung der Oberlandesgerichte* XLIII 21.

39. Court Luxembourg, June 26, 1946, *Pasicrisie Luxembourgoise* XV (1946) 234. After World War I the Belgian Court of Cassation, though not in very definite terms, held valid the payment made in occupation money during the German occupation. Judgment of April 16, 1923, *Pasicrisie Belge*, 1923 I 269.

The reacquiring sovereign may solve the problem by way of legislation. This happened on a large scale after World War II. See Fra-

ment [40] regarding payment in Japanese occupation currency on Philippine pre-war debts. The Court relied primarily on historical precedents.

There are, however, cases which advance a different point of view. In 1947 the High Court of Judicature at Rangoon (Burma) held invalid a promissory note couched in terms of Japanese occupation money on the ground that this was not a "sum certain" because of the decreasing value of that currency [41]—an evident misapprehension as the definiteness of a monetary unit is in no way impaired by the fluctuations of its value. Nor can one agree with a decision rendered by the Polish Supreme Court after World War I during which the German military authorities of the occupied Polish territory had established a new "Polish" currency. They had, for the protection of that currency, declared null and void contracts which would be made thereafter in terms of Russian rubles. The court, denying recognition of the German decree, held such a ruble contract valid.[42] The judgment would seem to be unjustified since the decree did not exceed the power of the occupant in regulating the currency of the occupied territory.

Between the occupant and the sovereign power itself the financial effects of the occupation will, as was mentioned, ultimately be settled by the peace treaty. If the occupant was defeated the damage done by him will become part of the war indemnity. The question assumed a peculiar significance after World War I, when the victorious powers, on the basis of President Wilson's "Fourteen Points" had waived war indemnity. Belgium then demanded more than five billion francs because of the entire depreciation of the mark currency which the German authorities had circulated in Belgium during the occupation. The Belgian government maintained that this was not a claim for war indemnity, but one for damages done by specific violation of international law, namely, by the illegitimate issuance of such currency

leigh, *supra*, n. 23, at 109, 110 et *seq.*

40. See cases cited *supra*, n. 3. An elaborate argument is given in the *Haw Pia* case.

When the Philippine Congress, during its Commonwealth period, passed a bill declaring the payments in Japanese occupation money valid, President Truman vetoed the bill. See Ortigas, "Aftermath of Japanese Currency in Philippines," *Commercial and Financial Chronicle* of March 13, 1947. On Japanese military currency in general, Lester, *International Aspects of Wartime Monetary Experience* (1944) 3. Cf. also Leonard, "Combat money," *Wall Street Journal* of March 17, 1943, pp. 1, 9.

41. Maung, "Enemy legislation and judgments in the liberated countries —Burma" 30 Journ.Comp.Legisl. & Int.Law 11 (1948).

42. Judgment of Aug. 28, 1919, *J.W.* 1922, 1689 (German translation).

and by its inflation for which the German government was deemed responsible.[43] The claim rested on very weak foundations legally,[44] but was submitted to by Germany under heavy political pressure [45] in a treaty of July 13, 1929,[46] in which both parties reserved their legal positions.

In this country, a question of constitutional law has been raised with regard to occupation currency.[47] In World War II American troops advancing into new areas used "Spearhead Currencies" i. e., regular "silver certificates" bearing a yellow seal in contrast to the blue seal printed on silver certificates in the United States. Since the Treasury withdrew a blue seal for each yellow seal certificate,[48] there could be no possible objection to "Spearhead Currency." Ordinarily the American forces employed military currency issued by the Allied Commander on behalf of the Allied Powers. As this type of currency did not im-

43. The claim was extended to the deposit of 1,600,000,000 marks—*supra*, n. 27—which, after the armistice, was turned over to the Belgian Government.

44. Regarding the responsibility for inflation see *supra*, p. 352. In this particular case the introduction of military currency was made inevitable through the actions of the Belgian Government itself which had removed the gold stock and the note printing plates of the Belgian Banque Nationale to London. The facts have now been fully presented by Feilchenfeld, *supra*, n. 9, at 71 et seq., but the issuance of military currency was justified anyway by the scarcity of circulating media under conditions of occupation. Roumania, which was in exactly the same situation as Belgium but was not politically backed in her claims by the other Allied Powers, got nothing. Baron Nolde, *supra*, n. 23, at 89.

45. In the "Young Committee" on Reparations, the operation of the Young Plan was made dependent on the previous consummation of a Belgian-German accord. Annexes VI to VIc of the *Report of the Committee of Experts Constituted by the Geneva Decision of September 16th, 1928* (1929).

46. League of Nations, *Treaty Series* CIV 202.

47. By Professor Spahr, an economist, in *Allied Monetary Currency* (1943). Treasury releases of August 17, 1943, *Press Service* No. 38–10, and of August 2, 1943, *Press Service* No. 37–85—both important for an understanding of the situation—are appended to his pamphlet. D. L. Kemmerer, "Allied military currency in constitutional and international law" in *Money and the Law* (ed. by New York University, 1945), is rightly less critical. See also Kemmerer and Beattie, "Allied military currency in Italy," *The Commercial and Financial Chronicle* of Sept. 21, 1944. The situation has been clarified by the Treasury Report for 1944–45, *supra*, n. 26, at 393. Constitutional objections were met by the device that when the armed forces received military currency from the American Government, the relevant military appropriation was charged for the dollar equivalent of the currency. In this manner the control of Congress over the expenditures was maintained.

48. Treasury statement in *New York Times*, October 25, 1943, p. 4.

pose financial liabilities upon the American government, its issuance was fully covered by the broad powers inuring to the President as the Commander-in-Chief of the Armed Forces in times of war.[49]

IV. Other "War Monies"

It is a parodoxical fact that the great destroyer of values, war, has given life to a number of novel "monies." Occupation money is by far the most important instance, but some others are no less varied and colorful. In this connection it may be mentioned as historical reminiscence, that generals of Ancient Rome enjoyed the right to issue coins with their effigies on them and that this rule became the starting point of imperial coinage.[50] Hence the issuance of money by the Allied Commander-in-Chief of World War II could have invoked an illustrious precedent. There is further the "obsidional" money (*monnaie obsidionale*) issued during a siege by the authorities of the invested city—a phenomenon traceable to the Middle Ages, and well known to collectors of coins.[51] Circulating freely within a political community and issued as legal tender by competent legal authority "obsidional" money may well be treated as real money. In fact, during the Franco-Prussian War of 1870–1871, French courts, applying the general laws on money and legal tender, inflicted penalties upon persons who had counterfeit obsidional money [52] or had refused to accept it in payment.[53] This is a marginal situation. In other cases legal characterization as money may be inappropriate. Instances of such "near-monies" are the "military payment certificates" issued in World War II by the American Army for the exclusive use of eligible Americans in United States military establishments [54] or the many types of "war-prisoner" monies employed in war prisoner camps.[55] In both cases we are confronted with administrative expedients for limited purposes.

49. Corwin, *The President: Office and Powers* (1940) 395.

50. A. R. Burns, *Money and Monetary Policy in Early Times* (1927) 407; Mommsen, *Roemisches Münzwesen* (1860) 373, 737.

51. See Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte* (2d ed., 1926) at 25, 27 *(Notmünzen)*. Strangely, emergency money was also issued by investing commanders. *Ibid.*, at 176.

52. Police Court of Dijon, April 13, 1871, *Sirey*, 1872 II 56.

53. Police Court of Besancon, April 1 and May 6, 1871, *D.P.* 1871 III 104.

54. The description is taken from a piece in the possession of the writer.

55. Cf. G. Kisch, "War Prisoner Money and Medals" (1945, reprint from *The Numismatist* vol. LVIII). In World War I alone there were thousands of types and varieties of these near-moneys. *Id.* at 4.

(B) International Cooperation

Section 35

COOPERATION THROUGH STANDARDIZING AND STABILIZING AGREEMENTS [1]

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I. Introductory

While monetary law has been used as a tool of economic separation and contest, it is much more suited for binding nations together; in fact, international agreements have been concerned with monetary matters since antiquity. Originally those agreements dealt with coins, i. e., with metallic circulating media. In this stage of development they tended to establish a common standard for coinage (kind of metal, fineness, weight, form, impress, etc.). In a word, they were "standardizing agreements." The more recent group centers on "ideal units" such as "dollar," "franc," "pound," and so on. Their purpose is to stabilize the value of the respective units in the international money market. A proper name would be "stabilizing agreement." [2]

II. Standardizing Agreements [3]

Standardizing agreements can be traced back to antiquity.[4] As early as 500 B.C. such treaties were concluded between Greek city-states.[5] Community of minting was rare, as each city ordinarily retained this precious prerogative, but, at least in some cases, the treaties seem to have provided for a compulsion upon

1. Parts of the following discussion have been taken with the editor's permission from my article, "International monetary agreements" in 38 Am.J.Int.L. (1944) 242.

2. Official American usage of the phrase "stabilization agreement" is narrower. *Infra*, p. 512.

3. Baron Nolde, "La monnaie en droit international public," *Rec.Ac.* XXVII (1929) 314, 366; Neumeyer, *Internationales Verwaltungsrecht* III (part 2 [III], 1930) 227.

4. On monetary conventions in ancient China and Etruria see A. R. Burns, *Money and Monetary Policy in Early Times* (1927) 43.

5. Detailed information is to be found in Burns, 90 and in F. Lenormant, *La Monnaie dans l'Antiquité* II (1878), 53. See also G. Gilbert, *Handbuch der Klassischen Staatsaltertümer* II (1885) 391.

creditors within the confederate territories to accept convention money in the payment of debts. Such money circulated side by side with local money, but information on this, as on other points, is incomplete. The most striking features of the ancient treaties are their close connection with military alliances and their termination through military defeats.

During the Middle Ages standardizing conventions are found principally in Germany and Italy, where the decline of imperial power resulted in the acquisition of the coinage prerogative by numerous principalities and cities, the latter being quite naturally in the lead of the movement for a better and homogeneous metallic circulation.[6] As in ancient Greece, community of minting was infrequent, whereas community of a legal tender seems to have been considered the corollary of unified standard and was often safeguarded by outright banishment of foreign coin. The conventions are more elaborate in this period, because of progress in the technique of coining, and the inclusion of detailed administrative and punitive regulations designed to secure a strict application of the standard. A standardizing agreement among cities and principalities of the Upper Rhine area, the *Rappenmünzbund,*[7] existed through almost two centuries, until 1584. Then, after many struggles and reconstructions, the Bund succumbed to Imperial policies which, though with slight success, tried to establish a unified monetary circulation within the Empire or at least within large parts thereof.[8]

In a few instances the medieval conventions, without creating a common standard of coinage, were merely aimed at establishing a unified area of metallic circulation (*circulatory* agreements).[9]

6. See Luschin von Ebengreuth, *Allgemeine Münzkunde und Geldgeschichte*, (2nd ed., 1926), 288; von Inama-Sternegg, *Deutsche Wirtschaftsgeschichte des Mittelalters*, III, 2 (1901), 372, 396, 416; G. Salvioli, *Il Diritto Monetario della Caduta del Impero Romano ai Nostri Giorni*, (reprint from *Encyclopedia Giuridica* 1889) 111.

7. Julius Cahn, *Der Rappenmünzband*, 1901. An important Italian convention of the standardizing type was concluded in 1254 between Bergamo and other Lombard cities. A monograph by Mazzi, *La Convention Monetario del 1254 e il Denaro Imperiale di Bergamo*, 1882, cited by Salvioli, 112, n. 12, was not available to the present writer. Italian medieval conventions were careful to relate their standards to those of the Empire.

8. Characteristically, the agony of the Bund was made most painful by a purely political motive: the desire of the member-cities to retain their coinage prerogative as a matter of prestige. Cahn, 202.

9. Luschin von Ebengreuth, *supra*, n. 6, at 289.

Monetary agreements of an international type originated first in the relations between England and the Low Countries.[10] Migration of coins between these two territories had been keen since the Eleventh Century, especially from England to Flanders. Negotiations leading to an apparently inconclusive agreement were conducted in 1469 between Edward IV of England, on the one hand, and Charles the Bold of Burgundy, as ruler of the Low Countries, on the other. The agreement was aimed at establishing definite ratios among English, Flemish, and some other current coins, with the ounce Troy as the weight unit. The agreement extended to gold coins, whereas the inter-German conventions of the period were concerned only with coins of silver and baser metal. It was followed by conventions concluded along similar lines in 1499 and 1523, between the then rulers of the two countries.

In the first centuries of modern times the territorial disintegration of the European monetary system was gradually overcome by the rise and consolidation of the great national states which, under the doctrine of mercantilism, were ill-disposed toward monetary treaties. One finds in this period a few instances of the interprovincial and standardizing type,[11] but it is only in the nineteenth century that monetary subjects reappear in international legislation.

In Germany the foundation of the Zollverein (1833) was the first important step in establishing an economic union among the politically separate German states under Prussian hegemony.[12] In 1838 the Union was strengthened by the conclusion of standardizing treaties among the member states of the Zollverein. Though the treaties left considerable divergencies among the types of coin to be used in Northern and Southern Germany respectively, they secured at least a fixed ratio between the North German thaler and the South German florin, the standard silver coins of the respective systems,[13] and imposed restrictions on minor coins; a special convention provided for prosecution and extradition of counterfeiters.[14] The urge for national unity made these con-

10. See A. de Witte, "Les rélations monétaires entre la Flandre et l'Angleterre jusqu'au 17 ième siècle" *Revue de Droit International et de Législation Comparée* XXVI (1894) 75, 86. The article rests on archival studies, but the information offered is rather vague.

11. See W. A. Shaw, *The History of Currency* (1896) 199 (Brandenburgian-Saxon treaties of 1667 and 1690); Luschin von Ebengreuth, *supra*, n. 6, at 290.

12. W. O. Henderson, *The Zollverein*, (1939).

13. Henderson 249, 251.

14. The treaties date from August 25 and 26, 1837 (Martens, *Nouveau Recueil des Traités* XIV 292, 294),

ventions a complete success; after the foundation of the German Reich, the convention currency was merged into the new Reich currency.

From an international point of view a treaty of 1857 between Austria and the member states of the Zollverein [15] offers greater interest. The treaty had been pushed by Austria, anxious to counteract Prussian hegemony. Her financial power fell short of her political ambition.[16] She had long suffered, and was then still suffering, from serious monetary disturbances called forth by the emission of unredeemable paper money and by an ensuing depreciation of her currency. The treaty therefore obligated the member states not to resort to the emission of such paper money and to withdraw existing issues from circulation by January 1, 1859. This was a unique piece of international legislation indeed.[17] As a matter of fact, exactly on January 1, 1859, Austria became entangled in new political difficulties which led to the war with France and brought about, in the face of the fresh treaty, a new emission of unredeemable paper money. As a result the treaty, though formally ended only by the Austro-Prussian war of 1866, became inoperative, except that the silver convention coins made by Austria flowed to Germany where, under the treaty, they had to be accepted as legal tender. When, in the early seventies, the depreciation of silver set in, the rapidly growing loss fell on Germany; after lengthy negotiations a small fraction of the loss was assumed by Austria. The treaty illustrates the fact that in monetary conventions the misfortune of one partner may easily, and even primarily, affect the others. In fact nobody, it seems, drew a real advantage from this monetary product of political ambition.

Another standardizing treaty is presented by the Scandinavian Monetary Conventions of 1873 and 1875 between Denmark, Sweden, and Norway.[18] In contrast to the German conventions, the Scandinavian treaty was based on the gold standard. Stan-

July 30, 1898 (*ibid.*, XV 670), May 8, 1841 (Martens, *Nouveau Recueil Général des Traités* II 56, 65), and Oct. 21, 1845 (*ibid.*, VIII 565). French translations in Janssen, *Les Conventions Monétaires* (1911) 473; analysis *ibid.*, 3. See also Henderson, *supra*, n. 12, at 139.

15. *Münzvercin* of Jan. 24, 1857 (Martens, *Nouveau Recueil Général des Traités* XVI, 2, p. 448).

16. Information amplifying the account given in the text is found in Janssen, *op. cit.*, p. 38, and Nolde, *supra*, n. 3, at 247, 369.

17. It was this treaty that prompted Janssen's *bon mot* told *supra*, p. 79, n. 24.

18. Nielsen, *Encyclopedia of the Social Sciences* "Monetary Unions"; Janssen, *supra*, n. 14 at 105; Nolde, *supra*, n. 3 p. 384; Agombart, *Politique Monétaire des Etats Scandinaves* (1930) 119.

dardization included subsidiary and minor coins; the principle of common legal-tender was extended to the entire range of convention money. Backed by racial ties and the propinquity of the member countries, and buttressed by stabilizing agreements,[19] the Convention survived World War I. In 1924, however, the circulatory and legal-tender community was ended for subsidiary and minor coins, when these coins were drained from Denmark and Norway by the premium on the Swedish crown; in 1931 the abandonment of the gold standard terminated the intra-Scandinavian circulation of gold coin altogether.

From the viewpoint of universal monetary history the so-called Latin Monetary Union of 1865 [20] constitutes by far the most remarkable instance of a "standardizing" treaty.[21] France, Italy, Belgium, Switzerland, and Greece (1868), were the signatory powers. France was the leader within the Union. French coins in the decimal system long prevailing in France were made the model of the major convention coins in respect to metal, fineness, weight, tolerance, and diameter; and the bimetallistic 1:15½ standard of the French system was embodied in the convention on the basis of the franc of Germinal 7th, year X (April 17, 1803). [Thus history presents us with standardizing treaties of all types —silver, gold, and bimetallistic.] The Latin Monetary convention did not touch upon coins of baser metal or upon paper money. It did not even provide for a legal-tender community; the co-contracting governments only undertook to receive the convention gold coin and five-franc silver pieces, wherever coined, in the payment of debts (community of "public receivability"). All this hardly amounted to a "union," [22] but the overstatement of

19. *Infra*, p. 509.

20. Full text of the main treaty of Dec. 23, 1865, with all later supplements and amendments up to 1910 in Janssen, *supra*, n. 14, at 514; English translation up to 1900 in Willis, *A History of the Latin Monetary Union* (1901) 271.

21. For detailed analyses and appraisals of the Latin Monetary Union see *Willis, supra*, n. 20; *Nielsen, supra*, n. 18; *Palgrave's Dictionary of Political Economy* (1923), "Latin Union"; Nolde, *supra*, n. 3, 372; Chasserie-Laprée, *La Convention Monétaire Latine* (1911); Gruel, *Die Lateinische Münzunion*, 1926; Egner, *Der Lateinische Münzbund seit dem Weltkriege* (1925); Stark, "Währungsverträge" in *Festgabe für Oscar Engländer* (1936) 263, 271; L. Bamberger, *Schicksale des Lateinischen Münzbundes* (1895). Much material—parliamentary, literary, diplomatic, etc.—on the convention of 1865 and the later amendments is found in *Pandectes Françaises* (1903) "Monnaie," sec. 381ff.

22. The preamble of the 1865 treaty employs the term *union monétaire*. In fact the term "Latin Monetary Union" has come to be generally accepted.

name goes hand in hand with the far-flung expectations underlying the treaty of 1865, which it was hoped would become the cornerstone of a unified world currency. For this reason the treaty explicitly opened the door for the accession of other countries, an invitation unusual at that time. But only Greece followed in 1868, while Spain, Serbia, Roumania, the Papal state and some South American countries contented themselves with issuing coins of the convention standard, without incurring international obligations.[23]

Troubles for the Union started very soon, owing to the depreciation of silver, a fact necessarily destructive of a bimetallistic standard. Deterioration of the Italian monetary system was another source of difficulties. Repeated and heavy alterations of the treaties, including the transition to a "limping" gold standard, proved necessary to perpetuate the Union, in which a point of political prestige was at stake for France. Ultimately the Union succumbed to the aftermath of World War I. In 1921 Switzerland felt herself constrained to cancel public receivability of the foreign five-franc silver coins and to declare them unfit for circulation [24]—a clear violation of the Union treaties which, committed by an eminently law-abiding country, illustrates the utter impracticability of the Union ties. A convention of the same year,[25] confirming the Swiss measures, practically finished the circulation of the Union silver coins outside the state of issue; circulation of Union gold coin outside Switzerland had stopped anyway, owing to currency depreciation, and was afterwards ended by devaluation which finally struck Switzerland herself.[26]

The basic problem of the Union is reflected by judicial decisions. When in 1894 an Italian appellate court had to enforce a French judgment calling for the payment of French francs, the court held payment in depreciated lira notes of the same nominal amount a lawful discharge of the debt.[27] The Court, it is true, reasoned only in terms of the *cours forcé* of the lira notes—a matter of internal law—without mentioning the Union treaty, but the Court was evidently guided by the idea of a unified franc of the Union.

23. One-sided adoption of foreign coin types had long been considered good practice *supra*, p. 317.

24. Decree of Swiss Federal Council Dec. 28, 1920; *Eidgenössische Gesetzsammlung* (XXXVII N. F. (1921) 52.

25. Martens, *Nouveau Recueil*, III *Sér.*, XIV 220; Fourtens, *La Fin de l'Union Monétaire Latine* (thesis, Paris, 1930).

26. Heer, *Die Abwertung des Schweizer Frankens* (thesis, Innsbruck, 1937).

27. App. Milan, May 1, 1894, *Giurisprudenza Italiana*, 1894, I (2) 705.

The issue reappeared on a larger scale when, after World War I, creditors of international "franc" loans were offered payment in depreciated (French, Belgian) francs or in lire but insisted upon the payment of "international" gold francs as defined by the Union treaties subsequent to the abandonment of the bimetallist standard. The creditors' theory was rejected by the weight of authority;[28] the court of one country unrelated to the Union advanced a particularly thorough and convincing argument against the theory of an "international gold franc." [29] Thus the Union, far from having brought about a world currency, had not even succeeded in establishing a unified "ideal unit" (money of account) for the Union countries.

Today it is familiar knowledge that in a modern monetary economy treaties concerned with coinage alone cannot reach the real source of international disturbances as reflected by the fluctuations of the rates of exchange. In fact, no more standardizing treaties have been concluded, since the consummation of the Latin and the Scandinavian Unions.[30] Dematerialization of money—that is, its severance from the metallic substratum—has called for new forms of international coöperation.

III. Stabilizing Agreements

The maintenance of a steady price of the domestic currency in the international money market is a paramount prerequisite for an orderly functioning of the economic system unless the cur-

28. Cass., Dec., 21, 1932, *J.D.Int.* 1933, 1201; Swiss Federal Tribunal June 27, 1918, *Amtliche Sammlung* XLIV (2) 213 and the decision in next note. The French Penal Code penalizes counterfeiting of money *ayant cours légal en France* by life sentences [Art. 132] and counterfeiting of "foreign" money less severely [Art. 133]. The *Cour de Cassation* held that Union coins circulating in France but issued by foreign governments were protected by Art. 133, not by Art. 132. Judgments of March 29, 1890, *Sirey* 1891 I 137; May 5, 1892, *D.P.* 1892 I 580. The "international franc" doctrine was followed by App. Paris, July 17, 1925, *J.D.Int.* 1925, 1018; (semble) App. Trieste, Feb. 21, 1935, *R.D.Comm.* 1935 II 531, 562, *aff'd*, Cass., Aug. 4, 1936, *La Settimana della Cassazione* 1937, 7.

The *franci seu libelli* in which the *Codex Juris Canonici* of 1917 expresses money values (Art. 534 I; 1532; 1541 II, III) seem to mean gold francs of the Union standard. Hoyer, Währungsfragen im Corpus Juris Canonici, in *Festgabe für Oscar Engländer* (1936) 101.

29. App. Berlin (*Kammergericht*), Sept. 25, 1928, *J.W.* 1929, 446.

30. The Austro-Hungarian monetary convention of 1892 (Austrian *Reichsgesetzblatt*, 1892, 652) made internationally binding the identical Austrian and Hungarian monetary laws previously enacted. This was not simply a standardizing treaty. Before and after the convention Austria and Hungary formed monetarily one territory.

rency is devised in the Soviet manner for inland purposes only. Before 1931 it was in the first place the job of the central banks to take care of the foreign exchange market. Notwithstanding their legal independence from the government, they normally cooperated with the latter for the protection of the national currency. The combined prestige and influence of government and bank were strong enough to make private banks and capitalists fall in line with the official policies. Since 1931 the governments have taken over the first front in the defense of the currency, with the central banks assuming more the role of technical aides. The governmental "stabilization funds," are a characteristic outgrowth of the world monetary crisis. After England had been compelled to abandon the gold standard, she created (in 1932) the Exchange Equalization Account to be controlled by the Treasury, for the defense of the pound.[31] Other countries followed,[32] the United States by establishing under the Gold Reserve Act of 1934 the two-billion-dollar "Stabilization Fund." [33] The "stabilization funds"—"equalization accounts" differ by name only—became an important tool in the stabilization of currencies through international cooperation.

Cooperation itself had started at the time when the central banks dominated the scene. An early, if not the earliest, instance is found in the aid granted in 1839 by the *Banque de France* to the Bank of England which was then seriously imperiled by a coincidence of bad crops with a bad financial crisis.[34] Such coöperation may develop into stabilizing agreements where aid is reciprocally promised. Thus in 1885 the Scandinavian central banks supplemented the monetary conventions of 1873 and 1875 by the mutual establishment of accounts on which the accredited central bank was allowed to draw at parity and without charge of interest.[35] In 1894 and 1900 the banks undertook to receive one another's notes at par, an unusual arrangement which—by creating a community of "public receivability"—bore some resemblance to the standardizing conventions of old. The agreements of the Scandinavian banks were terminated when, during

31. Hall, *The Exchange Equalisation Account* (1935); Waight, *The History and Mechanism of the Exchange Equalisation Account*, (1939).

32. "Exchange Stabilization Funds" in League of Nations, *Monetary Review* (Doc. 1937 II A8' p. 52); Rist, "Les fonds d'égalisation des changes", *Revue d'Economie Politique*, 1938, 1535; Heilperin, *International Monetary Economics* (1939) 245.

33. 48 Stat. 337, § 10, 31 U.S.C. 822a; Griffith Johnson, *The Treasury and Monetary Policy* (1939) 92.

34. Schleidt, *Die Kooperation der Notenbanken* (1931) 12.

35. Nielsen, *supra*, n. 18; Agombart, *supra*, n. 18, at 123.

World War I, note redemption and gold exportation were suspended.[36]

Much more important are the stabilizing agreements between governments. They are multi-partite or bi-partite. The earliest instance of the former type is the "sterling bloc" formed in 1934 by Great Britain, some Dominions (Canada was not among them), and the Scandinavian countries.[37] The members of the bloc—membership has been fluctuating—have tied their currencies to the pound sterling so as to make them rise or fall with the latter, joining their forces for the purpose of stabilization. This means large scale adoption of uniform monetary policies. A familiar instance is the formation of a common dollar pool, receptacle of all available dollar funds of the members. The bulk of the member currencies became thereby definitely "inconvertible" into dollars, so as to further curtail member purchases in the United States, a development which left vestiges in international law.[38] No formal document on the establishment or mechanism of the bloc has been published. Its operation is informal and flexible. Legal effects bear primarily on the preference which the members of the sterling bloc grant each other in the administration of exchange control.[39] A certain legal significance of the bloc is also evidenced by the fact that England as the head of the sterling bloc seeks equal protection for the interests of the bloc members; "sterling area" has thereby become a familiar term in international agreements.[40]

36. Regarding some insignificant remnants of the agreements, see Nielsen, *supra*, n. 18.

37. S. E. Thomas, *The Principles and Arithmetic of Foreign Exchange* (6th ed., 1934), 483; Foster and Rogers, *Money and Banking* (1936) 522; Condliffe, *Reconstruction of World Trade* (1940) 316; Emminger, *"Probleme des Sterling-blocks"* in *Währung und Wirtschaft* (a periodical) 1934, 157.

38. Abolition of the pool was required by the financial agreement between the United States and the United Kingdom, *Treaties and International Act Series* 1545, sec. 7 (1945) but was informally postponed in 1947. *New York Times*, August 21, 1947, p. 2, (There is no official publication). In the interval, a legal controversy had arisen whether a British-Argentinian Economic Agreement of Sept. 17, 1946, Cmd. 6953, violated the terms of the abolition of the dollar pool. The controversy was settled amicably. *Annual Report of the Secretary of the Treasury* for 1946–47, p. 189.

39. Arrangements seem not to have been published on this point either.

40. See, e.g., Anglo-Danish Monetary Agreement (English *Treaty Series* 1945 No. 4), Arts. 4, 8; Anglo-Netherlands Monetary Agreement (*ibid.*, 1945 No. 7), Arts. 5, 9; Anglo-Swiss Monetary Agreement (*ibid.*, 1946 No. 6), Arts. 5, 9, 10. Cf. also Anglo-Turkish Trade and Payment Agreement (*ibid.*, 1946 No. 29), Arts. 4, 5. The term "sterling area" was first used as a legal one in Defence (Finance) Regula-

While the sterling bloc though paralyzed by World War II, has finally survived, the "gold bloc" is entirely a thing of the past. It was established in 1933 among the countries of the former Latin Monetary Union and Poland and the Netherlands.[41] In a joint declaration [42] they expressed the determination of the bloc countries to uphold the free operation of the gold standard at the existing parities and within the framework of the existing laws. As early as 1934, Poland, Italy, and Belgium, unable to abide any longer by the policies of the bloc, withdrew. France, the Netherlands and Switzerland followed suit in 1936.

The "Tripartite" agreement of September, 1936, between the United States, Great Britain, and France [43]—and joined in November, 1936, by Belgium, the Netherlands and Switzerland [44]—is more explicit. Identical declarations by the United States and British Treasuries, referring to the assent of the French Government, proclaimed the inauguration of a common monetary policy in the interest of peace and of world prosperity. A common stand, though in vague and non-legal terms, was taken against quotas and exchange control as well as against further measures of devaluation, except for the then pending 1936 devaluation of the French franc. The pronouncements were supplemented by a statement of the American Secretary of the Treasury on November 24, 1936, to the effect that—subject to revocation on twenty-four hours' notice—the United States would buy from or sell to the British and French Governments gold at a rate "advantageous to the public interest," namely $35 per ounce, the legal standard of the dollar; the handling charge would be one-quarter of one per cent.[45] Reciprocally, it was declared, the British and French Governments had arranged for corresponding facilities to be afforded to the United States.

Legally the Secretary's statement amounted to a general license granted to the other Governments under the Gold Reserve

tions, 1939, § 10(1), Howard *supra*, p. 354, n. 30 at 223. In official English usage it has been replaced by "scheduled territories". Howard 16.

41. League of Nations, *Monetary Review*, II (1937), 26; Gunnicker, *Das Schicksal des Goldblocks* (1939).

42. The text may be found, e.g., in Bradford, *Money and Banking* (1937) 83.

43. *Federal Reserve Bulletin*, 1936, 759, 980 (American statements); Waight, *supra*, n. 31 at 169, 171 (British statements); League of Nations, *Monetary Review*, *supra*, n. 41, at 30; *Gunnicker*, *supra*, n. 41, at 77; Griffith Johnson, *supra*, n. 33 at 113.

44. *Federal Reserve Bulletin*, 1936, 941.

45. *Ibid.*, 940.

Act of 1934,[46] which authorized the Secretary of the Treasury to buy or sell gold "upon such terms as he may deem most advantageous to the public interest." The statement therefore constituted a unilateral act, but it was answered by reciprocal declarations couched in more indefinite terms of the other Governments.[47] The risk taken by the United States was slight because of the short time of notice and because the gold was available only for dollars.

The importance of the agreement cannot be gauged by its ostensible terms. It constituted, in the monetary area, a political declaration of solidarity which was designed for, and led to, monetary coöperation far beyond the buying or selling of gold at $35 an ounce. The preponderance of the political factor was brought home in 1937 when France decreed another devaluation of the franc. The agreement was continued, nonetheless.[48] Without being formally cancelled, it lost its significance through the establishment of the International Monetary Fund except perhaps in its relation to Switzerland, which is not a member of the Fund.

Bi-partite "stabilizing agreements" include principally arrangements by which a financially stronger state sells gold or its own currency to a weaker country in support of the latter's currency. This has been done on a considerable scale by the United States Stabilization Fund which, originally planned for the defense of the dollar, turned into a stabilization machinery for currencies of friendly nations. Since the transactions in point were within the scope of the statutory power of the Secretary of the Treasury, neither the form of a treaty nor specific Congressional consent were required.[49] Beneficiaries of the arrangements were primarily Latin-American countries such as Brazil and Mexico, and China.[50] In official American phraseology the term "stabilization agreement" is reserved for this kind of bi-partite convention.

46. 48 Stat. 337, §§ 8 and 9, 31 U.S.C. 733, 734.

47. See the text of the English declaration in Waight, *supra*, n. 31, at 171.

48. Statement by the Secretary of the Treasury, Mr. Morgenthau, of July 1, 1937, *Federal Reserve Bulletin*, 1937, 547.

49. In order to meet constitutional objections, the Secretary pledged himself to undertake such actions only with the agreement of the Congressional committees. *Annual Report* of the *Secretary of the Treasury* for 1940–41 p. 52.

50. Current statements on the arrangements are found in the Annual Reports of the Secretary of the Treasury. An abortive United States-Argentine agreement "between old and good friends"—*Annual Report* for 1940–41 pp. 33, 359, may be especially mentioned.

Section 36

COOPERATION THROUGH INTERNATIONAL REGULATION OF EXCHANGE CONTROL

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I. Introductory

Exchange control is an ample source of international monetary cooperation. Just because it is so utterly nationalistic—"asocial" in a society of nations—it would destroy its own ends without concessions leading to international monetary cooperation, however limited and uneasy. Even the utterly ruthless type of exchange control instituted by the Hitler government, was accompanied by numerous international arrangements of a monetary type. Only the countries of the Soviet rule present a different picture due to their policy of seclusion.

Since it is the basic problem of exchange control that the available media of international payment cannot satisfy all needs and claims, each system of control will have to allot priorities to certain payments. Among the privileged ones are ordinarily "commercial" debts, that is, debts arising out of import and export, since each country desires first of all to maintain the regular inflow and outflow of goods. "Financial" creditors generally must wait longer. There might be manifold further differentiations.

A kind of precursor to the agreements under discussion is the peace treaty of 1783 between the United States and England, inasmuch as it provided that creditors on either side should not meet with legal impediments in the recovery of their debts.[1]

II. Most-Favored-Nation Clause and Other Clauses in Commercial Treaties

In the international area, a traditional type of regulation consists in the grant of the most-favored-nation treatment. One must keep in mind, however, that even in the most liberal treaties

1. *Infra*, p. 568, n. 10.

of commerce, that treatment does not extend to each and every item, but is invariably conceded in respect to specific matters such as tariffs, internal taxes, navigation, etc. The same is true of exchange control. Owing to the late emergence of modern exchange control one finds pertinent clauses only in very recent treaties. An elaborate instance is presented by the United States-Mexican Reciprocal Trade Agreement of 1942.[2] This agreement restricts the most-favored-nation clause to the commercial field and forbids, within this orbit, any "prohibitive restriction or delay in the transfer of payment" which is not imposed on the other countries. The same principle is set out concerning rates of exchange, taxes, or charges on exchange transactions, and on payments necessary for or incidental to importation. "In general, the control shall be administered so as not to influence the competitive relationships between articles, the growth, produce or manufacture of the territories of that [the co-contracting A.N.] country, and like articles, the growth, produce or manufacture of third countries." Other most-favored-nation clauses applying to exchange control are not so elaborate,[3] but it may be doubted whether the United States-Mexican formula has much value beyond the goodwill of the contracting governments to administer the control in a fair and considerate way. Some treaties provide only for "a fair and equitable share in the allotment of exchange;" [4] in one case the promise of a "just and equitable" share was grafted upon a most-favored-nation clause,[5] an indication that the latter was held insufficient in this application. In an agreement with Chile of 1939, the United States was contented with Chile's promise not to use exchange rates higher than those which would be set by the free supply and demand of the market.[6] One or the other pertinent clause will ordinarily be found in recent treaties of commerce.[7]

2. *Executive Agreement Series* No. 311, Art. IV.

3. See, e.g., Treaty of Commerce of 1937 between the United States and Siam, *Treaty Series* No. 940, Art. III, par. 6. In the case of the Reciprocal Trade Agreement with Turkey of 1939, *Executive Agreement Series* No. 163, Art. 8, the general most-favored-nation clause is coupled with a kind of payment agreement (Art. 9), infra, n. 13.

4. Preliminary Commercial Agreement between South Africa and Czechoslovakia of 1937, League of Nations, *Treaty Series* CLXXXIX 97, Art. III; Trade Agreement between Canada and Guatemala of 1937, *ibid.* CLXXXXIV 66, Art. V, where the grant of tariff advantages is conditioned upon the observance of the fair allotment rule.

5. Treaty between the Netherlands and Ecuador of 1937, League of Nations, *Treaty Series*, CLXXXXIV 179, Arts. V and VII.

6. Provisional Commercial Agreement, *Executive Agreement Series* No. 144, § 3.

7. See R. C. Snyder, *The Most-Favored-Nation Clause* (1948) 149.

III. Pegging Agreements

A more definite regulation is imposed by agreements "pegging" the official rate of exchange between the contracting parties. The two governments concerned will then use their controls for the maintenance of the rate agreed upon; the latter may be altered only after mutual consultation.[8] "Pegging" treaties have originated, it seems, in English practice.[9] They contained, typically, a provision authorizing the central banks on both sides to fix, by mutual agreement, maximum spreads permissible in the markets above or below the official rate. Gold was ear-marked by the central banks for eventual settlement of balances.[10]

A kind of tacit pegging agreement may be found in the arrangements which in April, 1940, caused the American government to adopt the official English pound-dollar ratio. Ostensibly this was done by the Secretary of the Treasury for customs purposes only, but the measure was the result of a conference of the Secretary with the Secretary of State, the Attorney General, and the Secretary of Agriculture, a fact which was published.[11]

There is no longer much need for "pegging" agreements among members of the International Monetary Fund. Its Articles of Agreement, through the establishment of "par values"[12] constitute themselves a multipartite "pegging" convention on the largest scale.

IV. Payment Agreements in General

By a "payment agreement," a country under exchange control lifts its barriers to allow a limited outflow of money to the cocontracting country for the payment of debts.[13] Since transfer rather than payment is the real problem, the term "transfer

8. Thus the Anglo-Netherlands Monetary Agreement of 1945, Eng. *Treaty Series* 1945 No. 7, Art. 1 (III), prescribes that the Government shall "enforce the official rate as the basis of all transactions involving a relationship between the two currencies."

9. Anglo-Danish Monetary Agreement of 1941, Eng. *Treaty Series* 1945 n. 4.

10. See the Anglo-Netherlands Agreement, *supra* n. 8, Art. 4.

11. *Commercial and Financial Chronicle* April 20, 1940 pp. 2478–79; *New York Times*, April 17, 1940, p. 4. This is the situation in which *Barr v. United States*, originated. *Supra*, p. 484.

12. *Infra*, p. 533. "Relative" pegging agreements for the elimination of "cross rates" may still be desirable, *infra*, p. 535, n. 11.

13. For a payment agreement, in which the United States was a party, see *supra*, n. 3. Turkey undertook to make available for the import of American products, an amount of free foreign exchange determined with an eye to American imports during an agreed base period.

agreement" would seem more appropriate.[14] The counter-performance of the creditor country may assume various forms; for instance, the obligation to purchase, or to allow purchases of, goods produced in the debtor country so that the price may be used in discharge, total or partial, of the debts. For instance, an Anglo-Argentine convention of 1933 provided that England remove all restrictions upon the importation of Argentine beef, while the sterling payments of the English importers were to be made available, in a certain order, for Argentine payments to the United Kingdom.[15] The central banks will then effectuate the allotment of foreign currency according to the treaty plan. This organizatory scheme may be refined and elaborated so as to regulate and limit the whole field of commerce between the two states involved. The transfer-saving feature already observable in agreements of the Anglo-Argentine type, may then affect the legal position of the parties more seriously. Exporters, for instance, would receive only a part, say 40% of the price in "free" foreign exchange, whereas the rest, available in an account of the central bank, could be used only for compensating purchases in the other country.[16]

More recently payment agreements have been concluded principally under the European Recovery Program (Marshall Plan) among its European member countries. These conventions have culminated in the Agreement for Inter-European Payments and Compensations concluded in Paris on April 16, 1948, between nineteen European Governments. It provides for the settlement of balances between member countries on a multilateral basis through the interposition of an Agent—the Bank for International Settlements at Basel—which effectuates the necessary calculations and statements.[17]

14. The term "transfer agreement" is used in the title of the Anglo-German Treaty of 1938, League of Nations, *Treaty Series* CLXXXX-IV 247.

15. Anglo-Argentinian Convention of 1933, Eng. *Treaty Series* 1934, n. 2.

16. Such agreements have been made especially by France. See, e.g., Convention with Roumania of 1939, *J.D.Int.* 1939, 791; with Poland of 1947, Sirey, *Collection Complète des Lois* 1947, 448; with Turkey of 1947, *Revue Critique de Droit International Privé* XXXVI (1947) 473. A historically important payment treaty of recent years is the one concluded on October 21, 1943 between the Netherlands and the Belgo-Luxembourg Economic Union, *Staatsblad van het Koningrijk der Nederlanden*, Sept. 26, 1944.

17. The Agreement furthermore obligates the recipients of dollar aid to grant to their debtor countries certain "drawing rights", expanding thereby the benefits of the aid. The text of the long and complicated agreement, together with a lucid analysis, is found in Bank for International Settlements, *19th Annual Report* 1948/49 pp. 232 ff., 200

V. Clearing Agreements

Among the payment agreements, the clearing treaties (French: *accords de compensation,* German: *Verrechnungsabkommen*) [18] form an important group which offers particular interest from a juridical point of view. The typical clearing treaty [19] is bipartite. Its pattern—we may call the contracting states "A" and "B"—is the following:[20] The A debtors (principally importers) make payment, in their national currency, to the A central bank, of debts owed to B creditors and B debtors make similar payments

ff. The 1948 convention was preceded in 1947 by the Agreement for Multilateral Monetary Compensation concluded between France, Italy, Belgium (together with Luxembourg) and the Netherlands. Same Bank, *18th Annual Report* 1947/48 p. 32.

The Articles of Agreement of the International Monetary Fund are not opposed to payment conventions of member countries, *infra,* p. 540. Regarding the convention of 1948 cf. *Annual Report* of the Fund *for* 1949, at p. 31.

18. Swiss literature on this matter is outstanding. The thorough discussion by Hug, "Das Clearingrecht und seine Einwirkung auf die vertraglichen Schuldverhäitnisse" in *Zeitschrift für Schweizerisches Recht* 1936, 397a must be mentioned in the first place. See furthermore, Vieli, "Das Rechtssystem der Clearingverträge" and Jaccard, *De l'Incidence Juridique du Clearing* (Schweizerische Vereinigung für Internationales Recht, publication no. 32, 1934); Rosset, "Les accords de clearing et les obligations contractuelles," *Zeitschrift für Schweizerisches Recht* 1936, 201a; Mettler, *Die Clearingzahlung* (1936). Detailed information is offered by K. Schneider, *Der Welthandel im Clearingverkehr* (1938). As comparative studies of non-Swiss authors there may be mentioned Bogiavi, *I Regolamenti Internazionali Mediante Compensazione* [*Clearing*], 1943; Dubois (Belgian), "Considérations générales sur les accords de clearing" in *Revue Economique Internationale* 1935 (III) 108. See furthermore, on French law, Jolly, *Traité des Opérations de Compensation* (1935), a study lacking in clarity; on German law, Fischer, *Devisenclearing (Schriftenreihe zum Devisenarchiv,* # 5, probably 1937), without legal analysis; on Dutch law, Seiler, *Economische Gevolgen der Nederlandsche Clearingverdragen* (Amsterdam, 1937)—, representing a study of more than local interest; on Belgian law, Bourdeaud'hui, *Accords de Compensation et Conventions de Paiements* (1938); on Hungarian law Szâsy, *J.D.Int.* 1937, 738. See furthermore, Harris, *Germany's Foreign Indebtedness* (1935) 60; H. R. Ellis, *Exchange Control in Central Europe* (1941) passim. Regarding unilateral ("compulsory") clearing, *supra,* p. 490.

19. In a broader sense the arrangements cited in n. 17 may be called "clearing" treaties also, but it is preferable to reserve the term for the conventions regulating primarily the settlement of private debts as described in the text.

20. General surveys are League of Nations, *Enquiry into Clearing Agreements,* C. 153 M. 83 (1935) and International Chamber of Commerce, *Accords de Compensation* (trilingual, 1936).

to the B central bank of their debts to A creditors;[21] from the funds thus received each central bank will satisfy the creditors in its own country by paying out domestic currency equivalent to what the debtor has paid to his own central bank. (Notice of payment is given by the debtor's bank to the creditor's bank). After discharging the claims of creditors with the funds paid by debtors, the surplus, if any, where not used for payment to underprivileged (non-commercial) creditors must be turned over to the clearing bank of the other country for the settling of the balance, principally in gold; but frequently payment is avoided by additional exports of the debtor country, by credit transactions, etc. The problem of procuring foreign exchange is materially eliminated by the clearing operation, but at heavy cost.

The first clearing treaty, it seems, was concluded in 1931 between Czecho-Slovakia and Hungary.[22] Until the outbreak of World War II, they were used on a large scale by Germany and Switzerland,[23] but much less by common-law countries [24] as compulsory clearing is repugnant to the spirit of the common law. Nevertheless the basic organizatory principle of the clearing treaties—the establishment of two intercommunicating clearing offices which operate in their respective national currencies,—is an English war-time invention incorporated in the peace treaties of World War I.[25]

Ordinarily only debts resulting from importation (commercial debts) are covered by the clearing arrangement; where "finan-

21. The debtors are deprived of the privilege of making payment with paper money of the creditor's country, *infra*, n. 42.

22. Ellis, *supra*, n. 18, at 81.

23. See the studies referred to *supra*, n. 18. France, too, entered into clearing treaties; a more recent instance is the French-Finnish Convention of 1941, *Nouvelle Revue de Droit International Privé* 1942, 521. A great number of clearing treaties were negotiated by Greece, even with the Soviet Union, *J.D.Int.* 1939, 453.

24. Clearing treaties have been concluded by England: with Italy on Nov. 6, 1936 League of Nations, *Treaty Series* CLXXVII 183—see Ital.Cass. July 29, 1941 *Giurisprudenza Italiana* 1942 I(1) 13—; with Spain on Jan. 6, 1936, League of Nations, *Treaty Series* CLXVI 283—see *Meacock and others* v. *Bryant & Co.*, 74 *Lloyds L.R.* 53 (K.B. 1942)—; with Turkey on Sept 2, 1936 *ibid.* CLXXII 289. See also p. 490.

25. Cf. Gidel and Barrault, *Le Traité de Paix avec l'Allemagne* (1931), preface by Mr. Jaudon, p. xvii. The clearing procedure of the peace treaties, however, exhibits special features, such as the governments' guaranties for their nationals. See the writer's *Das Ausgleichsverfahren* (1923); French tr.: *La Procédure de Compensation et Liquidation* [1923].

cial" debts are included they are more or less under-privileged. Another regular feature of the clearing obligation consists in the requirement that the creditor and the debtor must be domiciled in the respective territories of the signatory states. Under a typical clearing treaty the foreign creditor still has power to bring a suit against the debtor in the ordinary law courts, though judgment will be for payment into the debtor's clearing bank.[26] The debtor's clearing bank has no action against the debtor in the ordinary law courts, nor has the creditor against that bank [27] or against the clearing bank of his own country.[28] However, rights and duties of the banks may be enforced through administrative or administrative-judicial proceedings.[29]

In substantive clearing law it is of paramount importance to determine the moment at which payment to the creditor is completed. Some clearing treaties provide that the debt is discharged through the debtor's payment to his office;[30] others regard it as discharged only when the money is made available to the creditor.[31] Apart from express treaty regulation, the latter date is

26. According to Court Amsterdam, Oct. 19, 1937, *Bull. I.I.I.* XXXIX (1938) 317, the creditor is not barred by the clearing from levying upon assets of his debtor which are in the hands of the creditor or of a third person.

27. Under a Greek-Roumanian treaty, a Greek importer had made an overpayment to the Greek clearing office. In a puzzling decision the Court Athens held in 1938 that only the Roumanian exporter and the Roumanian clearing office had the capacity to sue for refund of the balance. *J.D.Int.* 1939, 452.

28. The foreign creditor's right, therefore, cannot be garnished at the clearing office by his own judgment-creditor. Trib. civ. Seine, Dec. 5, 1933, and March 19, 1935, *Bull. I.I.I.* XXXIX (1938) 316.

29. Such a remedy against measures of the clearing authorities is provided by French law. French *Conseil d'Etat*, (highest administrative court) June 11, 1937, *D.H.* 1937 III 442 [denying relief]. According to civil-law conceptions, clearing relations pertain to "public law" and are therefore not generally subject to the jurisdiction of the ordinary law courts. Superior Court Solothurn, April 22, 1937, *Schweizerische Juristen-Zeitung* XXXVI (1939) 174.

30. E. g., Anglo-Turkish Agreement of 1936, *supra* n. 24, Art. 8; German-Dutch Clearing Treaty of 1937, *R.G.Bl.* 1937 II 725, Art. 5; Anglo-Italian Treaty of 1935, League of Nations, *Treaty Series* CLX 259 Art. 6 (for payments by English debtors); Ital.Cass. April 22, 1940, *Giurisprudenza Italiana* 1940 I (1) 614.

31. Italian treaties cited by App. Milan, Dec. 17, 1937, *Foro Italiano* 1938 I 263 (summarized *J.D.Int.* 1939, 183); Swiss treaties referred to by Mettler, *supra*, n. 8, at 96 and 136 (IV). The Milan court considered as decisive the moment in which the Italian debtor of an Austrian creditor was credited with the Austrian schillings by the Italian office.

generally held decisive.[32] Nevertheless, according to sound theory the debtor having complied with the clearing agreement is not in "default" (*mora*) and is not liable for interest.[33] Nor do the clearing banks pay interest; clearing treaties ordinarily make express provisions to this effect.[34]

Other problems are connected with the assignment of clearable debts. Despite the presence of a German-Swiss clearing treaty, the Swiss Federal Tribunal allowed an assignment by a Swiss creditor to a Swiss assignee of a debt owed by a German, though under the applicable German law the validity was dependent on the consent of the German exchange control authorities. A clearing treaty, the Court held, does not imply recognition of the whole exchange-control laws of the co-contracting state.[35] The decision was justifiable since from the angle of clearing law it did not matter whether A or B, both of whom were Swiss, was the creditor. The situation, however, would have been different if the clearable debt had been assigned by a German creditor to a Swiss, or by a Swiss creditor to a German, or if the assignee was a resident of a third country.[36] Under a clearing treaty,

32. As put by the Swiss Federal Tribunal, May 14, 1934, *Amtliche Sammlung* 60 I 168, 173 it is out of the question that payment by the Swiss debtor to the Swiss clearing bank discharges the debt. Accord: Court Milan, July 7, 1937, *Foro Italiano*, 1937 I 1034, *J.D.Int.* 1938, 135; April 20, 1938, *Banca, Borsa e Tituli di Credito* (a periodical) 1938, 125 [thorough discussion]; Hug, 519a; Jaccard 49; Niboyet, quoted by Jolly, *supra*, n. 19, at 80. Contra: App. Milan, judgment in n. 31.

33. See Mettler, *supra*, n. 19, at 99. The Swiss Federal Tribunal, Sept. 21, 1937, *Amtliche Sammlung* 63 II 303, 311, held that a surety (a Swiss in this instance) was no longer liable after the principal debtor, an Italian, had made payment (under an Italo-Belgian clearing treaty) at the Italian Office on behalf of his (Belgian) creditor. The ruling is laid down with an eye to a *solidarische Bürgschaft* which corresponds approximately to the Anglo-American surety; it applies even with greater force to a guaranty *(einfache Bürgschaft)*. As a matter of fact a surety or guarantor cannot generally be supposed to have to protect the creditor against restrictions ordained by the creditor's law. Art. 501 IV of the Swiss Law of Obligations as amended gives the surety in the case of a foreign clearing arrangement the same defense as in the case of foreign exchange control. *Supra*, p. 480.

34. *Accords de Compensation*, *supra*, n. 20, at 4.

35. Judgment of Oct. 8, 1935, *Amtliche Sammlung* 61 II 242, 248.

36. In the case of the Swiss Federal Tribunal, Feb. 19, 1936, *supra*, p. 477 n. 2, the assignment by the German creditor to the Swiss was recognized without any mention of the clearing treaty. The latter was referred to by the Superior Court Zurich, Nov. 14, 1935, *Blätter für Zürcherische Rechtspflege*, 1936, 64. The court likewise approved of an assignment from a German to a Swiss creditor and did not object to

the assignment is good, if at all, only on condition that it does not alter the debtor's obligation to make payment to the clearing bank since otherwise the funds available for the clearing, will be depleted. Attachment of a clearable debt has been held invalid by the Swiss Federal Tribunal [37] and by other courts,[38] but this ruling appears doubtful.

The clearing law may also affect the legal position of a party that is not a subject of a clearing state, viz., where that party imports from its state goods produced in a clearing state into the other clearing state, and the treaty extends to such situations. Thus a Swiss firm had bought Roumanian cow-hair from a London firm, to be paid in first-rate bank checks on London. A suit by the London firm brought in Switzerland was thrown out of court because under a Swiss-Roumanian clearing treaty importation of such hair came under the clearing.[39] The court expressly held it irrelevant whether or not, when contracting, the parties knew of the treaty; and the fact that the creditor was domiciled in a third state, was, it seems, not even considered. In similar cases the Swiss Federal Tribunal decided the same way, suggesting that the seller, if domiciled in a third state, may appoint an agent in Switzerland for the collection of the purchase price [40]—a rather obnoxious requirement.

a possible payment by the Swiss debtor to the assignee. The court merely considered that the assignee would be responsible in case the money were transmitted directly to the foreign assignor. The confused decision was properly criticized by Hug, *supra*, n. 18, at 566a. See also ns. 37 and 38.

37. Judgment of Dec. 13, 1935, *Amtliche Sammlung* 61 III 204.

38. Court Amsterdam, Dec. 6, 1935, *Nederlandsche Jurisprudentie*, 1936, 90; Trib. civ. Seine, May 21, 1935, *Bull. I.I.I.* XXXIX (1938) 316, and Trib. comm. Seine, Oct. 9, 1936, *ibid.*

39. Superior Court of Solothurn, *supra*, n. 29, Similarly, *Cour de Justice* Geneva, July 9, 1937, *Bull. I.I.I.* XXXIX (1938) 318, poorly reported [license royalty for a German film clearable although the license contract was made "by a resident of a third country"].

40. Judgment of May 14, 1934, *Amtliche Sammlung*, 60 I 168. In this case the Swiss importer of an Austrian automobile was punished for not having made payment into the Swiss clearing bank in accordance with the Austrian-Swiss Clearing treaty. He had imported the car from Germany and had already made payment in Germany to a German agent of the Austrian seller. Here one might say that payment to an agent has the same effect as payment to the principal. However, an independent (Austrian) seller was the intermediary in the case of Swiss Federal Tribunal, July 10, 1936, *ibid.* 62 I 196, involving German goods clearable under the German-Swiss treaty. Again punishment was inflicted upon the Swiss importer, who had made payment otherwise than through the Swiss clearing bank.

Agreements between the parties inconsistent with clearing provisions are void.[41] It might be attractive to the debtor to pay the foreign creditor in foreign notes available at a discount in the debtor's country, but the tender of the notes will be ineffective, even where it is not explicitly prohibited by the treaty.[42] Where a bill of exchange is drawn on behalf of a clearable debt, it is subject to the clearing procedure just as the underlying import transaction. A Swiss court has held that payment by the acceptor-importer via clearing traffic operates as a discharge against bona-fide holders of the bill.[43] Conversely, an Italian court has decided that payment outside the clearing against delivery of the bill does not extinguish the debtor's obligation to make remittance to the clearing office though it may terminate the debtor's obligation under the bill of exchange.[44] The latter point may be questioned. In any case the rigid clearing law heavily infringes upon the rules on negotiable instruments, especially upon those regarding protest and recourse against prior holders. Hence clearing agreements sometimes restrict the use of bills of exchange within their field of application. The difficulties may be lessened by making the instruments "payable through clearing" (clearing clause).[45] On the whole the use of bills of exchange is not advisable where a clearing exists.

Violation of clearing provisions may be punishable under the local clearing statute. Such violations will often assume the form of evasion. For instance, payment will be made outside the

41. Ital. Cass. April 8, 1941, *Foro Italiano*, 1941 I 955; July 31, 1941, *Giurisprudenza Italiana*, 1942 I (1) 15; App. Basel, March 21, 1947, *Schweizerische Juristen-Zeitung XLV* (1949) 377. The invalidity rule may be extended to agreements made before the treaty came into force, Austrian Supreme Court, Feb. 12, 1935. *Die Rechtsprechung* 1935, 61; Superior Court Solothurn, *supra*, n. 29. The Clearing treaty may admit an exception. This was done by a French-Austrian treaty of 1932, Austrian Supreme Court, Dec. 18, 1934 *Die Rechtsprechung* 1935, 6 [agreement held valid that the debtor may convert the francs due into schillings according to the rate used by the National Bank of Austria rather than according to the clearing rate.]

42. *Cour de Justice* Geneva, March 24, 1944, *Schweizerisches Jahrbuch für Internationales Recht* 1945, 165; Justice of the Peace St. Gilles, Oct. 15, 1936 *Journal des Tribunaux Belges* 1937, 121. In the former case the court's conclusion was supported also by the fact that the French and Swiss governments had agreed on a French franc-Swiss franc conversion rate. On pertinent treaty provisions see *supra*, p. 489.

43. *Cour de Justice* Geneva, *supra*, n. 39.

44. App.Genoa, April 6, 1938, *Giurisprudenza Italiana* 1939 I(2) 1.

45. This expedient has been employed in Swiss practice, Hug, *supra*, n. 18, at 590a; Mettler, *supra*, n. 18, at 122.

clearing channels in a third country,[46] or by making the transaction appear to be domestic through the interpolation of dummies.[47] It is just such cases which have led to recorded penal sentences.

Clearing treaties have met with unfavorable comment.[48] Among other shortcomings much time may elapse until the creditor is reimbursed by his clearing office; cases have been reported where it took more than a year to accomplish the transfer. Also, a debtor clearing office may find itself financially unable to effectuate transfers of balances according to plan. The governments, clearing offices, or central banks, are not liable to the parties for such losses. The parties are not prevented from allocating the risk among themselves by contract provisions, but such arrangements seem to be rare.[49]

VI. Other International Regulations of Exchange Control

The paramount purpose of clearing agreements consists in the diminishing of transfers as far as possible. In this respect "barter agreements" are akin. They purport exchange of goods between the signatory states mainly in order to avoid payments and transfers.[50] Still they cannot eliminate the monetary factor entirely. The exchangeable goods must needs be evaluated in terms of

46. See cases in n. 40.

47. In a like case the schemers were punished by the Superior Court Zurich, Oct. 13, 1936, *Blätter für Zürcherische Rechtsprechung*, 1938, 44, *aff'd* by Swiss Federal Tribunal, Feb. 1, 1937, *ibid.* 1938, 47.

48. "The widespread use of clearing agreements has had serious and detrimental repercussions upon world trade." This is the conclusion of Securities and Exchange Commission, *Report of Protective and Reorganization Committees* V (1937) 437, where the matter is thoroughly discussed and further references are given. See also the essay by Seiler, *supra*, n. 18.

49. Hug, *supra*, n. 18, at 583a, interprets a contract clause under which the place of the debtor's clearing bank is the "place of payment" to mean that with the debtor's disbursement the risk of foreign exchange fluctuations shifts to the creditor. However, an agreement concerning this risk should be distinct; Mr. Hug's interpretation may be a trap to the creditor. Under a clearing which compulsorily regulates the whole course of the financial transaction the "place of payment" clause is devoid of reality.

In *Meacock and others* v. *Bryant & Co.*, *supra*, n. 24, the court read into a marine insurance policy an indemnity insurance covering the clearing situation, but there seems to be no organized insurance of this type. Apparently, the risk is too heavy.

50. That purpose may be absent or secondary in particular cases. See e.g., the Anglo-American barter agreement of June 23, 1939 [exchange of cotton for rubber], Dept. of State, 20 *Press Releases* 547 (1939).

money. This raises an international problem—that of the currency in which the (market) value of the goods is to be expressed. While before 1914 and perhaps even up to 1931 it was the pound sterling that enjoyed the highest prestige in the international commodity markets, more recently the American dollar has attained a unique position in the international pricing mechanism. This is most impressively demonstrated by the fact that the Soviets have seen fit to resort to dollar quotations in their international agreements.[51]

"Stand-still agreements" are consented moratoria designed to meet difficulties of transfer rather than of insolvency.[52] While basically private in character, and concluded between creditor and debtor groups, governments participate in the agreements directly or indirectly. This was true, for instance, of the American-German Stand-still agreements of 1931 and the following years. In these cases the accounts held by American and German banks were made saleable to prospective travelers in Germany ("traveler marks") so that the American banks were enabled to receive dollars for their marks. Stand-still agreements may therefore qualify as payment agreements; they have this character distinctly insofar as they provide, in addition to the arrangements mentioned, for part-payments in discharge of the indebtedness.

51. Zlobin "Financial and credit relations of the Soviet State with foreign countries" in *Finances of the U. S. S. R. in Thirty Years* (1947, in Russian) 342, points out that the prices of the commodities have been fixed by the Soviets either in U. S. dollars or in the currency of the co-contracting country. Obviously, only in exceptional cases could the co-contracting countries have developed markets suitable for an international determination of prices.—For reference to Mr. Zlobin's article the writer is indebted to Professor Oliver Lissitzyn, Columbia University.

52. The agreements—denominated in Germany officially *Deutsches Kreditabkommen*, with the addition of the year—are listed and summarized in Flad-Berghold-Fabricius. *Das Neue Devisenrecht* (1937) A8, 11. The laws and executive decrees issued by the German Government in connection with the agreements —illustrative of the latter's official character—are found *ibid.*, C. 7. Similar agreements have been concluded with Swiss creditor banks. See E. Wenzel, *Die Deutschen Stillhalte-Abkommen und ihre Auswirkungen auf die Schweizerischen Banken* (1940); W. Jung, *Die Drei Stillhalte-Abkommen von 1931, 1932 and 1933* (thesis Münster 1924). The main agreements were commented upon every year in the *Bank-Archiv* by H. Simon. A case in point is *Reichsgericht*, Jan. 15, 1934, *Bank-Archiv* XXXIII (1934) 388 [customers of German banks do not participate in the benefits of the agreements].

In addition to the Stand-still agreements, there were similar conventions with German public corporations. These "Credit Agreements for German Public Debtors" (such as municipalities) are likewise list-

There have been probably still other types of international regulations of exchange control, particularly if one includes arrangements between central banks, but not much has transpired thereon.[53]

Section 37

THE INTERNATIONAL MONETARY FUND

(A) HISTORY AND STRUCTURE

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I. Historical

The call for world-wide cooperation in monetary matters found its first formal expression in the invitation extended in 1865 by the Latin Monetary Union to the nonmember countries. The "Tripartite Agreement" of 1936 suggests faintly the same notion. One might add the foundation in 1930 of the Bank for International Settlements in Basle.[1] The bank, primarily designed to facilitate the settlement of reparation payments under the Treaty of Versailles, was also entrusted with the task of promoting cooperation among central banks,[2] but did not accomplish much in this respect. A national agency, the stabilization fund, was more successful in the international sphere. As was seen, this was particularly true of the American Stabilization Fund which aided principally foreign currencies. Hence the main historic

ed in Flad-Berghold-Fabricius, *supra*. See also Harris, *Germany's Foreign Indebtedness* (1935) 22, 103.

53. Cf. International Chamber of Commerce, *Accords de Compensation* (1936) 5 [arrangements between central banks]. Rasminsky, *Foreign Exchange Control* in Canada (reprint from *Canadian War Economics*, ed. by J. F. Parkinson, Toronto, 1941) 23, mentions agreements made by England with other countries during the war, restricting the transfer of sterling accounts in these countries. There are, however, no formal treaties on this score.

1. Writings on the Bank abound. Particularly informative are E. L. Dulles, *The Bank of International Settlements*, 1932 (with little analytical discernment) and H. L. Schlüter, *Die Bank für Internationalen Zahlungsausgleich* (1932). Further references in the writer's article, "International Monetary Agreements" Am.J.Int.L. 1944, at 253, n. 65.

2. Art. 2 and 22 of *Statuten* (articles of association) of the Bank. The *Statuten* are reproduced by Dulles, 581 *et seq.*

root of the International Monetary Fund must be sought in the stabilization fund. Its name distinctly points to its pedigree. Characteristically, the American Stabilization Fund, in settlement of the American subscription, transferred practically the whole of its assets to the new institution,[3] thus ending, more or less, its own function.

The framework of the international Fund originated in the American "Proposal for a United and Associated Nations Stabilization Fund" of 1943, later styled "Proposal for an International Stabilization Fund of the United and Associated Nations." (White Plan), and the English "Proposals of an International Clearing Union" (Keynes Report).[4] While the International Monetary Fund constitutes, on the whole, a compromise between the two projects, its legal structure is based preponderantly on the American blueprint.[5] There were also other influences.[6] The Fund Agreement received its ultimate form at the United Nations Monetary and Financial Conference held from July 1–22, 1944, at Bretton Woods, N. H.,[7] at the invitation of the United States. The Conference was attended by representatives of forty-four states. The "Final Act" of the Conference contains as "Annex A" the "Articles of Agreement of the International Monetary Fund" and as Annex B the "Articles of Agreement of the International Bank for Reconstruction and Development."[8] The main purposes of the Fund are to promote "international monetary cooperation," and, more specifically, "to promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange deprecia-

3. *Annual Report of the Secretary of the Treasury* for 1946–47, p. 48.

4. The proposals and other pertinent materials are found in *Proceedings and Documents on the United Nations Monetary and Financial Conference*, Dept. of State Publication 2866, 2 vols. (1948) at pp. 1536 *et seq.*

5. Cf. J. H. Williams, *Postwar Monetary Plans* (1947) 3; Lutz, *International Monetary Mechanisms; The Keynes and White Proposals* (1943); Nogaro, *La Monnaie et les Systèmes Internationales* (2d ed. 1948) 149; Lajugie, "Plans et accords monétaires internationaux" in *Revue Générale de Droit International Public 1944*, 181; Bachmann, *Die Konventionen von Bretton Woods*, (Switzerland, 1946). See also Board of Governors of the Federal Reserve System, *Bretton Woods Agreements. A Bibliography April 1943–December 1945.* (1946; confined to publications in English).

6. See particularly "Tentative Draft Proposal of Canadian Experts for an International Exchange Union," *Proceedings and Documents, supra* n. 4, at II 1575.

7. *Proceedings and Documents, supra*, n. 4, at 1575.

8. *United Nations Monetary and Financial Conference. Final Act and Related Documents* (1944). Dept. of State Publication 2187; also in *Proceedings and Documents* 942.

tion." [9] The International Bank for Reconstruction and Development remains outside the scope of the present inquiry. The popular name "Bretton Woods Agreements" covers both conventions. They are supplemented by national regulations; particularly by the American Bretton Woods Agreement Act of 1945,[10] and by the English Bretton Woods Agreement Act, 1945, and Order in Council, 1946.[11]

The Agreement on the Fund came into force on December 27, 1946, when thirty governments had declared their accession.[12] The Fund, whose seat is at Washington, D. C., has at present (1949) forty-eight members.[13] Among the outsiders are the Soviet Union, Argentina, Switzerland, Sweden, Spain, Portugal, Ireland, Germany, Japan, Roumania and Hungary. Thus much room is left for monetary developments outside the Fund area.

II. Organization

The Fund possesses full juridical personality.[14] It is immune from judicial process and taxation;[15] its property, wherever located, cannot be searched or seized;[16] its archives are inviolate.[17] Property restrictions by local governments must not interfere with proper operations of the Fund.[18] Officials and employees of the Fund are accorded important privileges, especially immunity from criminal or civil prosecution with respect to acts performed in their official capacity unless the Fund waives

9. Articles of Agreement of the International Monetary Fund, Art. 1 (iii). Hereafter "Art." without addition refers to these Articles of Agreement.

10. Act of July 31, 1945, 59 Stat. 512, 22 U.S.C., 286–286k.

11. 9 & 10 Geo. VI c. 19, S. R. & O. 1946 I 43.

12. International Monetary Fund, *First Annual Meeting of the Board of Governors (1946–47).* Members were authorized to join until Dec. 31, 1946 with the privileges of original members under Art. II § 2 of the Agreement. *Selected Documents. Board of Governors Inaugural Meeting* (1946) 21, 28.

13. They are: Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, China, Columbia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Honduras, Iceland, India, Iran, Iraq, Italy, Lebanon, Luxembourg, Mexico, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Siam, Syria, Turkey, Union of South Africa, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia.

14. Agreement, Art. IX, § 2.

15. Agreement, Art. IX, §§ 3 and 9. The Fund, however, is free to bring a suit and may be sued with its consent. In such a case, the federal courts have jurisdiction. Bretton Woods Agreements Act, *supra*, n. 10, § 10.

16. Art. IX, § 4.

17. Art. IX, § 5.

18. Art. IX, § 6.

the immunity.[19] Notwithstanding these exemptions from external compulsion, the Fund must observe the laws of the countries in which it operates,[20] but remedy for violations can be sought only through diplomatic channels. "Inviolability" such as has been accorded to the Headquarters of the United Nations,[21] has not been accorded to the premises of the Fund.

The supreme organ of the Fund is the Board of Governors. Each member, whatever its "quota," appoints one governor and one alternate.[22] As authorized by the Agreement, the Board has delegated its powers, with certain exceptions, to the executive Directors.[23] Five to seven of them are "appointed"—each by one of certain privileged members—; five to seven are "elected" by the other members.[24] The executive directors select the Managing Director, who conducts the current business of the Fund.[25] Some of the powers conferred upon the administration are quite unusual. Not only may the administration, in emergency situations, temporarily suspend important provisions of the Agreement,[26] but in the case of disputes between the Fund and a member or between members, questions of interpretation of the Agreement must be submitted to the Executive Directors for decision,[27] with the Board of Governors acting as an appel-

19. Art. IX, § 8. The Agreement provisions on immunities and privileges have to be applied in the light of the Convention on the Privileges and Immunities of the Specialized Agencies of November 21, 1947, Annex V, United Nations, *Official Records of the Second Session of the General Assembly*, Resolutions (1947) 114, 126, and of the International Organizations Immunities Act of Dec. 29, 1945, 59 Stat. 669, 22 U.S.C. 288 *et seq.*

20. Always provided that those laws do not interfere with proper operations of the Fund, *supra*, n. 18. For instance, the Fund is generally not subjected to national exchange control regulations. In this country its gold transactions do not require the Treasury license prescribed by the Gold Reserve Act of Jan. 30, 1934, 48 Stat. 337 § 3, 31 U.S.C. 441; U. S. Treasury, "Gold Regulations," 1937, 31 Code Fed. Reg. Part 54.

21. Joint Resolution of Aug. 4, 1947, 80th Congress, Public Law 357, especially § 9; Headquarters of the United Nations, Interim Agreement, *Treaties and Other International Acts Series* 1677 (1947).

22. Arts. XII §§ 1 and 2.

23. Agreement, Art. XII, §§ 2(b) (f) (g); Art. XX, § 3(b); By-Laws, § 15, *First Annual Meeting of the Board of Governors* (1946) 81, 87.

24. Art. XII, § 3(b) (c). The Executive Directors publish Annual Reports (International Monetary Fund —Annual Report, hereafter cited "Annual Report"). The fiscal year runs from July 1 to June 30. The instruction of the U. S. members of the administration is regulated by the Act *supra*, n. 10.

25. Art. XII § 4.

26. Arts. XVI § 1; V, § 4.

27. Art. XVIII(a).

late board. The Board's decision will be final.[28] Courts have no place in this system.[29] Whether the Fund authorities have to follow seasoned legal rules of interpretation is not certain. In any case the exception of "excess of power" valid against decisions of international tribunals,[30] is no less valid against administrative decisions. In other words, a contention to the effect that a decision of the Fund authorities amounts to alteration rather than to interpretation of the Agreement, would be relevant. Nor are decisions of the Fund authorities binding upon private persons, including subjects of member states.[31] Still they may carry weight in this respect, too.

Membership in the Fund is built on "quotas" which are comparable to shares in a joint-stock company, except that the quotas are unequal, indivisible, and untransferable. The quota in itself is only a numeral, but it serves as a measure for the determination of obligations and rights.[32] Among the obligations the most important arises from the subscription; [33] it is equal to the quota. Payment in gold is prescribed for a part of the subscription, namely, at least 25% of the quota or 10% of the member's net official holdings of gold and United States dollars, whichever is lower. The remainder has to be paid in the member's own currency, in lieu of which the Fund may accept non-negotiable, non-interest-bearing notes payable on demand, a procedure turning the rest of the subscription into an unsecured promise.[33] Among the various rights based on the quota, the right to purchase foreign currency [34] is practically paramount. Again the voting power in the meetings of the governors, as well as of the executive directors, depends on quotas,[35] though there are many modifications of this principle.[36] In a num-

28. Art. XVIII(b).

29. Disagreements of the Fund with former members or with any member during the liquidation of the Fund, are subject to arbitration. Art. XVIII(c). The Fund has been given power to request Advisory Opinions from the International Court of Justice. Charter of the United Nations, Art. 96(II): International Monetary Fund, *Summary Proceedings* (Board of Governors) 1947, 52.

30. See, *e. g.*, Oppenheim, *International Law*, II (6th ed., by Lauterpacht, 1947), § 16.

31. Art. XVIII does not appear among the provisions of the Agreement which have the force of law according to the English and other Bretton Woods (on municipal enactments, *infra*, p. 352).

32. On the determination of the quota see Agreement, Art. III, §§ 1 and 2 (adjustment of quotas).

33. Art. III, § 3.

34. *Infra*, p. 538.

35. Agreement, Art. XII, § 5.

36. The most important instances are Art. III § 2 [change of quota, ⅘ majority and consent of member

ber of cases the members affected by the planned measure have veto rights.[37] The original schedule of quotas envisaged—in millions of dollars—a total of 9,100, of which 3,175 fell to the United States, 1,300 to the United Kingdom, and 1,200 to the Soviet Union[38] which, however, after signature silently withdrew from the Fund.[39] In 1949 the voting power of the United States amounted to 34.23 of the total, the United Kingdom being second with 16.18.[40] The reaching of the 33-1/3% line did not give the United States much extra veto power.[41]

The Fund is affiliated with the United Nations as a "specialized" international agency.[42] The Geneva General Agreement on Tariffs and Trade of 1947[43] and the Havana International Trade Organization Charter of 1948[44] provide for a close collaboration with the Fund. Under either Convention monetary problems are of crucial significance, especially where a country wants to resort to import restrictions in order to safeguard its balance of payments. In these situations the new organizations and their

affected]; Art. IV, § 5(b) [change in par value, only on proposal of the member affected]; Art. IV § 7 [uniform change in par value of all members, majority plus concurrence of all members with 10% of quotas, subject to veto by any member of a change in par of its own currency]; Art. V § 8(e) [change in charges, ¾ majority]; Art. XII, § 3(b) [increase in number of directors, ⅘ majority]; Art. XII § 8 second sentence [publication of reports on member's economy, ⅔ majority]; Art. XV § 2(b) [compulsory withdrawal, majority of Board according to voting power]. See also Art. XII § 2(c), (d); Art. XVI, § 1 (a), (c), (d); Art. XVII(a), (b); Schedule C.

37. See, for example, Art. III § 2 [change of quota]; Art. IV § 5(b) [change in par value]; § 7 [uniform change of par values]; Art. VII § 2(i) [additional lending of a scarce currency]; Art. XVII(b) [certain amendments to Agreement requiring unanimous consent].

38. As appears from Schedule A to the Agreement.

39. The Soviet Union not only signed the Agreement, but in a sensational move at the end of the Conference had consented to an increase of her quota. *Proceedings and Documents, supra*, n. 4, at 1111. Later, without offering an explanation, she did not answer invitations of the Fund. See Hexner, "Soviet Union and the International Monetary Fund," Am. J.Int.L., 1946, 637; Knorr "The Bretton Woods Institutions" 2 *In-International Organization* (1948) 35.

40. *Annual Report*, 1949, App. 7 England has power to veto uniform changes in the par values (Agreement, Art. IV, § 7).

41. Except in the case of Art. XII, § 8, second sentence, *infra*, n. 54.

42. Charter of the United States, Art. 57. An Agreement was concluded in 1947, between the United States and the Fund International Monetary Fund, *Summary Proceedings*, (Board of Governors) 1947, 47.

43. *United Nations Publications*, 1947, II, 10, vol. 1.

44. *Dept. of State Publication* 3206.

members will be obligated to accept the fact findings of the Fund on balances of payments and other monetary matters. They must also accept the Fund's determination as to whether an action by the country involved is in accordance with the Fund's Articles of Agreements, and with regard to other questions of a monetary nature.[45]

III. Member Obligations

If one believes the letter of the Agreement, the members, large and small, are placed under the surveillance of the Fund in their whole international monetary conduct. Conditioning phrases such as "(If) consistent with this Agreement", or "not contrary to the purposes of the Fund" clarify again and again the definitions of members' rights. Members are under surveillance also in their relations to non-members;[46] such relations must not jeopardize the objectives of the Fund. For the purpose of surveillance the members must provide the Fund with ample information,[47] for instance, on their holdings—official and private, at home and abroad—of gold and foreign exchange; on exports and imports, according to countries of destination and origin; on its international balance of payments, properly itemized; on its international investment position; and on other points. It may be mentioned in this respect that compliance with this obligation is easy for the United States with its powerful economic system, its old publicity tradition, and its highly developed statistical apparatus, but the matter is different with other nations.

Under Art. XX § 2(a) of the Agreement, each member's instrument of acceptance must set forth that the government "has taken all steps necessary to enable it to carry out all of its obligations under this Agreement." As regards the obligations concerning the status, immunities and privileges of the Fund, Art. IX § 10 imposes upon the member governments the additional duty to make the pertinent provisions of the Agreement "effective in terms of their own law," that is, to "incorporate" them into their respective municipal laws. No such duty is specifically set forth regarding the other parts of the Agreement. It is true that at least in the case of one other provision [Art. VIII § 2(b) (1)] incorporation into the municipal law is inescapable because otherwise that provision would be inopera-

45. Geneva Agreement, Art. XV(2); Havana Charter, Art. 24(2). At the time of this writing the Charter is not yet in force, and the Geneva Agreement operates only provisionally and on a limited scope.

46. Art. XI.

47. Art. VIII, § 5.

tive.[48] But in general the governments are not bound to transform the canons of the Agreement into their internal laws.

Of course, the Agreement is internationally binding upon the member governments to its full extent, but the absence of the internal effect is of considerable importance. The situation is highlighted by the language of the English and Canadian [49] enactments: they state that only the provisions on status, immunities and privileges of the Fund and Art. VIII § 2(b) (1) have "the force of law". The English Bretton Woods Order in Council is particularly illuminative. It contains a Schedule enumerating the Agreement provisions which "have the force of law;" these provisions are only those mentioned above. That arrangement makes it perfectly clear that the nonenumerated provisions are not the "law of the land;" they are not *ipso facto* binding upon individuals and, to this extent, must not be applied by the ordinary law courts. Similar enumerations are found in the Bretton Woods Acts of the United States.[50] Most regulations of other member states are not so specific [51] and may give rise to doubts that can be solved only on the basis of the principles prevailing in each particular state regarding the internal-law effect of international agreements. The celebrated controversy on the "monistic" or "dualist" theory [52] may play a role in such inquiries though the situation at hand is peculiar inasmuch as the Agreement itself does not generally require the internal-law effect.

As far as the international obligations of the member governments are concerned the Fund has four means to enforce them. It may limit the use of its resources (practically the purchase of foreign currency) by the member; or it may declare the member temporarily or permanently ineligible to use them at all.[53] It may, furthermore, with two-thirds of the total voting power consenting, publish a report on monetary or economic conditions of a member which directly tend to produce a serious disequilibrium in the international balance of payments.[54] Finally, in a special proceeding, the Fund may exclude the member ("compul-

48. *Infra*, p. 541.

49. Act of Dec. 16, 1945, 9–10 Geo. VI ch. 11.

50. There the language is used that the enumerated provisions "shall have full force and effect in the United States and its Territories and possessions." 22 U.S.C. 286h. The divergence from the English and Canadian enactments is verbal only.

51. Many member states it seems have not even passed formal Acts on the subject.

52. See, *e.g.*, Oppenheim, *International Law*, I (6th ed., 1947, by Lauterpacht), 35.

53. Arts XV, § 2(a); V, § 5; VI, § 1(a).

54. Art. XII, § 8, second sentence.

sory withdrawal").[55] No further penalty is provided. Settlement of accounts is the same regardless of whether the withdrawal is voluntary or compulsory.

All considered, the Fund's power to enforce the obligations of the members is strictly limited. Political considerations will generally restrain members from openly antagonizing the Fund. However, the Fund, if defied by a politically influential country, might find itself in the weaker position. When France, in her conflict with the Fund,[56] did not yield, the Fund barred her from further access to its resources [57]—a fact apparently not of great concern to her—but no proceeding toward her "compulsory withdrawal" was initiated. France has since participated further in the administration of the Fund through her governor, her executive director and her staff members.[58]

Section 38

THE INTERNATIONAL MONETARY FUND

(B) FUNCTION

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I. Par Value

The concept pivotal to the functioning of the Fund is the "par value" of currencies. According to the Agreement, the par value "shall be expressed in terms of gold as a common denominator, or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944." [1] The alternative is verbal only: the dollar as defined means simply 15-5/21 grains of gold 9/10 fine. Thus the gold clause stoned to death by so many legislatures, has been resurrected in full glory on the international plane. Even the venerable weight-and-fineness formula has been preserved. The

55. Art. XV, § 2.

56. *Infra*, pp. 535, 546.

57. *Annual Report* 1948, 37. Even this information was omitted from the Fund's Press Release, *ibid.*, 76.

58. When in 1948 South Africa introduced new exchange restrictions clearly violative of Art. XIV § 2, the Fund had to acquiesce in the *fait accompli*. *Annual Report* 1949, 27.

1. Art. IV § 1(a).

reference to the dollar, useful for practical purposes, brings home the position of the dollar as the "key currency" [2] of the whole plan. The gold tie of the par values which was absent in the Keynes plan, is one of the most important concessions to the American point of view.

The Fund cannot change the par value without the consent of the member concerned.[3] The member is free to make a change of not more than 10%; greater changes require the Fund's approval, which must be given only in order to "correct a fundamental disequilibrium" of the currency.[4] Interpretation of this formidable term is controversial;[5] probably it does not mean more than that there must be serious reasons of a monetary kind necessitating the change asked for. The Fund is prevented from objecting to the change on the ground of domestic, social or political policies of a member.[6] This restriction of the Fund's authority is hardly workable. One is reminded of the famous pronouncement of Baron Louis, Minister of Finance under Napoleon I: "*Faites moi de la bonne politique, je vous ferai de bonnes finances.*" The half-hearted provision of the Agreement is the unfortunate outgrowth of compromise as the United States would not go beyond the 10 percent limit.

2. A term proposed by Williams, *supra*, p. 526, n. 5.

3. Art. IV §§ 5(b) and 7. Regarding the first fixation of par values cf. Art. XX § 4(b). For consenting to a change in the dollar parity the American representatives need Congressional authorization. Act of July 31, 1945, § 5, 59 Stat. 514, 22 U.S.C. 286(c).

4. Art. IV § 5(c) (f). Under the American (White) Plan, *supra*, p. 526, at IV(4)—*Proceedings and Documents* 1544—the restrictions would have been even more rigid. According to Art. IV, § 5(e) of the Agreement a member may make independently any change if the change does not affect the international transactions of the Fund. This was apparently intended for the Soviet Union. Gerschenkron, *Economic Relations with the U. S. S. R.* (1945) 17.

The "par value" is also basic to the administration of the Geneva General Agreement, *supra*, p. 530 at Arts II 6(a); VII 4(a). Under this provision, however, "tolerance" amounts to 20 per cent. "Multiple" exchange rates, *supra*, p. 451, are not compatible with par values. See however, *infra*, p. 535, (Canada).

5. It has been criticized from the economist's point of view by Knorr, "The Bretton Woods institutions," *International Organization*, 2 (1948), 26. See also Haberler in *International Monetary Policies* (Post-war Economic Studies # 7, 1947) 97 and Heilperin. *International Monetary Reconstruction* (1945) 44.

6. Art. IV § 5(f). On an English inquiry it was stated that steps necessary to protect a member from unemployment of a chronic or persistent character are among the measures necessary to correct a fundamental disequilibrium. *First Annual Meeting*, (Board of Governors 1946) at 105. The inquiry, it is believed, did not set a valid precedent.

The members are duty-bound to observe the proclaimed parities in transactions of foreign exchange. They must arrange "through appropriate measures" viz., through exchange control, that private transactions in their territories will be made only within the limits set by the Fund; countries whose authorities trade freely in gold according to parity for the settlement of international transactions, i. e., the United States, are exempt from that obligation.[7] However the par value is not binding outside the scope of the Agreement, for instance, in the field of taxation, though it might be accepted as the best evaluation available. The Geneva General Agreement on Tariffs and Trade, 1947,[8] provides for the use of the Fund's par values in the assessment of customs, but in the United States and elsewhere the necessary changes in municipal legislation have not yet been undertaken.

Even with respect to transactions in foreign exchange, enforcement of par values will necessarily encounter resistance under the ever-changing conditions of our shaky present.

Early in 1948 the tension generated by the pressure of financial conditions against the rigid par value system led to an explosion. France introduced a dual market system for certain foreign currencies over the Fund's disapproval[9]— a measure which actually destroyed the proclaimed par value of the French franc. And throughout the years, Canada has been allowed to maintain divergent "official" and "free" rates of her dollar at odds with par value.[10] Generally, wherever "free" or "parallel" markets exist, deviations from par values are bound to appear.[11]

In case the currency of a member deteriorates the Fund may ask the member for an additional payment on the subscription in

7. Art. IV § 4(b).

8. *Supra*, p. 530, Art. VII.

9. Annual Report 1948, 36, 76. In the newly opened "free market" the dollar rate rose soon to 300:1 as against the official par value of 119. Hart, *Money, Debt and Economic Activity* (1948) 405, n. 2. On the French Incident see also, *infra*, p. 546.

Italy's fluctuating rate system was not objected to by the Fund because a par value of the lira has not yet been fixed. *Annual Report* 1948, 63.

10. *International Financial Statistics* V (1949) # 5, p. 106.

11. In this connection "cross rates", that is, relative valuations of foreign currencies—say of the dollar and pound in the Italian free market—constitute a problem particularly apt to disturb international trade. Cf. *Annual Report* 1948, 26; Bresciani-Turroni, "The problem of the cross rates of exchange" in Banco di Roma, *Review of the Economic Conditions in Italy* II (1948) 147.

In November 1948, England and Italy concluded an agreement pegging the sterling-lira quotations relative to the dollar. International Monetary Fund, *Annual Report*, 1949, p. 23.

order to set off a loss in the gold value of the payments made.[12] This may well be extra punishment for ill-fate. The rule applies, however, only where the "foreign exchange value" of the currency has "depreciated to a significant extent within that member's territories." [13] Changes in purchasing power do not count; in fact, they are irrelevant throughout the Agreement. Nor may the Fund take into account a depreciation which occurs outside the territories of the member. Only changes *within* those territories are contemplated but there fiat rates will prevail in the case presupposed. What was in the minds of the draftsmen of this provision is not very clear. So far the rule has not been applied, e. g., not against France.

II. Control of the Gold Market

With regard to gold—aside from foreign exchange, the paramount "medium of international payments"—the Agreement prescribes that the members must buy or sell only at par value within the margin prescribed by the Fund.[14] Private transactions on gold are not mentioned. One can assume, however, that members must not countenance any gold transaction, public or private, which would jeopardize exchange stability.[15] As far as a member's own obligations are concerned, the Agreement does not distinguish between internal and external transactions in gold, but the Fund seems to restrict its supervisory functions to external transactions as a matter of policy.[16]

Control of the gold market is perhaps the most vital and critical task of the Fund. The pressure against the $35 ratio, basis of the Fund's par values and quotas, is tremendous, and is enhanced by the anxiety of numberless individuals to secure a tangible hoard in the case of further devaluations or of a much-apprehended military conflict. The Fund has hardly the power to meet this pressure. Transactions in gold are more difficult to control than those in foreign exchange which are more or less carried out by banks exposed to the public eye. With respect to gold, the vast territories outside the Fund's area, especially in the Near East, and the "free" gold markets in France and Italy, open yawning gaps in the system of control. Within the territories

12. Art. IV § 8(b).

13. Under the American (White) Plan—*supra*, p. 526, n. 4, —III (4) any significant depreciation would have entitled the Fund to the claim for an additional payment. *Proceedings and Documents* 1544.

14. Art. IV § 2.

15. Art. IV § 4(a).

16. *Annual Report* 1948, 39; see also *Annual Report* 1947, 79. On the Fund's own gold transactions see *Annual Reports* 1947, 32; 1948, 45; 1949, 44.

of the members themselves the fact that the Fund's regulations have not the force of law makes itself felt. As far as local regulations are concerned, governments may be unwilling or unable to enforce obedience. Or their regulations may be inadequate.[17] For instance, in February, 1949, the dailies reported that South African gold was sold above parity with the cooperation of an English broker. That broker would not have violated the English law unless the gold was destined for importation to England which, apparently, it was not. The Fund has taken various steps to overcome the existing difficulties and has been in part successful.[18] Open gold transactions above parity have been reduced with the result that some sources of unrest regarding the maintenance of gold parity have disappeared. It has not been possible, however, to overcome sufficiently the resistance of the Union of South Africa whose producers of gold are anxious to sell their gold above parity which they easily could except for the Fund's regulations.[19]

III. Purchase and Repurchase of Foreign Currency

Each member has a right to buy from the Fund foreign currency equivalent to twice the member's quota.[20] This right renders the Fund comparable to a cooperative bank, yet the dissimilarities outweigh the similarities. Not only does the Fund transact exclusively with governments and their agencies, but it makes no loans. Lending for economic development and reconstruction is the field of the International Bank, the Fund's twin institution. The Fund's task is to remedy disturbances in foreign exchange relations through supply of the needed foreign currency.[21]

The exercise of the purchase privilege is the principal "use of the Fund's resources" [22] open to members. It is conditioned in several ways.[23] A member may buy foreign money freely with

17. In 1948 the Fund requested the members to submit the text of their regulations and a statement of their administrative practices regarding international transactions in gold. *Annual Report* 1948, 41. On the Fund's suggestion (*ibid.*, p. 40) the Treasury amended the Provisional Regulations under the Gold Reserve Act (now "Gold Regulations") Order of May 20, 1948, 13 Fed.Reg. 2742.

18. *Annual Report* 1948, 40; 1949, 33.

19. *Annual Report* 1948, 42, 81.

20. *Agreement*, Art. V §§ 2 and 3, especially § 3(a) (iii).

21. On inquiry the United States was reassured by the Fund that members have no access to its resources for financing relief, reconstruction, armaments, or large outflows of capital. *First Annual Meeting, supra*, n. 6, at 106. Cf. also Agreement, Art. XIV § 1.

22. Art. V § 3; XIV § 4; XV § 2(a).

23. See generally, Art. V § 3. There are already several Fund decisions on this matter. *Annual Report*

its own currency up to 75% of its quota. Afterwards it must not increase the Fund's holdings of its currency more than 25% yearly; hence the total available to the member would be fully disposed of after five years. Equally important, members are under the obligation to annually repurchase from the Fund with gold or "convertible currency" (that is, actually, with dollars) parts of its own currency held by the Fund [24] so as to replenish the Fund's dollar and gold assets. More precisely, the member must repurchase half of the increase that has occurred during the year in the Fund's holding of the member's currency, but this principle is refined by various enlargements, limitations, exemptions and special definitions [25] which make the repurchase provisions the most involved part of the whole Agreement—in fact, perhaps the most intricate norm ever found in an international treaty. Pressure toward repurchase is further exerted through a special charge levied by the Fund upon members whose currencies held by the Fund exceed their quotas; the charge is sharply graduated according to the size and the duration of the excess.[26]

Evidently, a credit element is inherent in the sale-repurchase scheme. Juridically there is nothing novel about it. The *report* (contango) transaction of continental stock exchanges represents another "sale-repurchase" type evincing a credit element (there it enables the bull speculator transacting in futures to carry on his speculation beyond the day fixed).[27] By no means does the credit element justify the use of "loan" phraseology.[28] The latter has been religiously skirted by the Agreement. Whatever the

1948, 97; 1949, 81. For instance, according to Art. V, § 3(a) (1), the member has to "represent" that it needs the foreign currency. It has been held that "represents" means "declares." *Annual Report* 1947, 31; 1948, 97. The Fund may waive purchase conditions. Art. V § 4.

24. Art. V § 7(b). In addition, a member holding undesirable foreign currency may be entitled to sell it to the country of origin. Art. VIII § 4. This is technically no "repurchase"; one might call it "resale."

25. Art. V § 7(b) (c) and Schedule B; see also Art. XIX(a)-(f). Cf. Brown, "The repurchase provision of the Proposed International Monetary Fund," Am.Econ.Rev.1945, 111 (with illustrative examples).

Requirements are equally complex in the "resale" situation referred to *supra*, n. 24. Art. VIII § 4.

26. Art. V § 8(c).

27. See, *e. g.*, Lyon-Caen and Renault, *Traité de Droit Commercial* IV (5th ed., 1925), nos. 964 *et seq.*, and the writer's "Die Börsengeschäfte" in *Ehrenbergs Handbuch des Handelsrechts* IV (1918) 586.

28. As used, for instance, by Westerfield, *Money, Credit and Banking* (rev. ed. 1947) 525, 527, where even the "charge," *supra*, n. 26, is referred to as "interest."

reasons (and they are not only legalistic but also psychological) "loan" phraseology is inaccurate in this particular application.

IV. Exchange Control Under the Agreement

The transfer regulations of the Agreement differentiate between "capital transfers" and "current transactions," a distinction replacing the older one of financial and commercial payments. Restrictions of capital transfers are not prohibited; the Fund may even request a member to introduce them in order to meet a large or sustained outflow of capital.[29] Restrictions of current transactions are permitted (or required) only in two cases, namely, (a) if a currency becomes so scarce (dollars!) that the Fund will have to apportion its supply among the members, and (b) during the transitional period.[30]

The scarce-currency problem is of paramount economic interest but is less intriguing legally.[31] Regarding the transition period—which runs five years from March 1, 1947 it seems—members may for its duration maintain controls over current transactions and adapt them to changing conditions; those whose territories were occupied by the enemy in World War II may introduce new restrictions.[32] Even during the transitional period, abolition of restrictions on current transactions should be taken into consideration by the Fund and its members. On the other hand, restrictions do not end automatically with March 1, 1952. Members who wish to retain them have to consult the Fund. If the

29. Art. VI, § 1(a).

30. Art. VIII, § 2(a), with references.

31. See, particularly, Williams, *supra*, n. 5, at lxxii; Bernstein, "Scarce currencies and the International Monetary Fund," Journ. Pol. Econ., 1945, 1; Warburton, "The Tripartite Problem of Scarce Currencies" 64 Pol.So.Qu. 388 (1949).

With regard to the handling of scarce currencies, Art. VII sets forth a number of procedural regulations. Furthermore, under Art. VIII § 6 members agree not to invoke obligations of earlier agreements in such a manner as will prevent the operation of restrictions imposed under Art. VII for reducing the scarcity. Does this mean (as assumed by Williams, *supra*, at lxxvii) that if dollars are apportioned as "scarce currency," the United States must put up with discriminatory treatment contrary to previous agreements? Countries short of dollars, have to cut down imports from the U. S. This consequence, apparently envisaged by Williams, is not discriminatory in a legal sense. Cf. Geneva General Agreement, *supra*, p. 530, Art. XV.

32. Art. XIV, §§ 2–5. March 1, 1952, also marks the deadline for some commercial liberties of the members according to the Geneva General Agreement on Tariffs and Trade, Art. XIV 3 (a). As to the beginning of the transitional period, see Art. XIV § 4, and *Annual Report* 1147, 70, but the question seems not to be definitely settled as yet.

Fund in a carefully regulated proceeding advises against retention and the member does not comply, repressive measures may be taken.[33] In any event, it appears that exchange control will probably persist far beyond the transitional period.

The borderline between capital transfers which may remain under control with no time limit and current transactions is drawn in the agreement by defining the latter [34] and empowering the Fund to elaborate the definition further. Whatever the borderline, control of capital transfers requires a certain control of all transfers in order to intercept capital transfers disguised as current transactions.[35]

V. International Effect of Contract Invalidation

The innate contradiction between the proclaimed objectives of the Fund—namely, elimination of exchange control—and its actual result—namely, preservation of exchange control—is accentuated by the fact that in two important relations the Agreement makes provision for strengthening exchange control (in itself purely a matter of domestic law) by giving it international effect. Art. VIII § 2(b) second sentence, encourages members to "co-operate, by mutual accord in measures for the purpose of making the exchange control regulations of either member more effective. . . ." Thus the Agreement favors special exchange control arrangements, bipartite or multipartite, among members. This authorization has been used on a large

33. Art. XIV § 4.

34. Agreement, Art. XIX(i): "Payments for current transactions means payments which are not for the purpose of transferring capital, and includes, without limitation: (1) All payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities; (2) Payments due as interest on loans and as net income from other investments; (3) Payments of moderate amount for amortization of loans or for depreciation of direct investments; (4) Moderate remittances for family living expenses."

The concept of "current transactions" has been used in various public acts outside the Agreement, for instance, in Treasury rulings under the Freezing Order, *supra*, p. 455, cf. *Annual Report of the Secretary of the Treasury* for 1940–41, p. 53, in the Anglo-American Financial Agreement of 1945, Dept. of State *Publication* 2439, No. 8(ii), and in the Anglo-Argentinian Economic Agreement of 1946, Cmd. 6953, *passim*. The definition set out in the Agreement might be found helpful elsewhere. On the other hand, it is binding upon individuals only insofar as it has been included in national regulations, and this applies with even greater force to definitions which the Fund authorities should announce in the future. *Supra*, p. 531.

35. This has been acknowledged, with evident reluctance, by Art. VI § 3.

scale for conventions saving the actual transfer of gold or money by way of elaborate set-off procedures. The Agreement for Intra-European Payments and Compensations, of 1948,[36] is the main instance.[37]

The other provision in point forms the legally most interesting part of the Agreement. It is the first sentence of Art. VIII § 2(b) which reads as follows:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement, shall be unenforceable in the territories of any member.

The rule can be traced back to a suggestion of the Keynes Plan that "inward movements not approved by the countries from which they originate" may be "deterred" abroad by appropriate means.[38] The English were therefore leading in the process of drafting. The original draft read that "exchange transactions in the territory of one member involving the currency of any other member, which evade or avoid the exchange regulations prescribed by that other member and authorized by this Agreement, shall not be enforceable in the territory of any member." [39] A proposal to make such transactions an "offense" outside the country of the currency involved, failed in Committee.[40] An attempt to confine the provision to violations of the par value rule was likewise unsuccessful.[41] The final text evolved from the Drafting Committee [42] with no indication of the reasons for the changes made.

36. *Supra*, p. 516.

37. Cf. also the French-Egyptian Agreement of 1948, *Revue Critique de Droit International* XXXVII (1948) 537. There are in the Agreement also some minor provisions which tend to give international effect to national exchange control. The member's right to resell foreign currency (*supra*, n. 24) does not exist where the currency was acquired contrary to the exchange regulations of the foreign state, Art. VIII § 4(b) (iii). Furthermore, members are directed to adapt agreements made before the institution of the Fund to the latter's requirements, Art. VIII § 6. The Havana I.T.O. Charter, *supra*, p. 530, in the preparation of which the Fund participated, provides in Art. XXIV 6(d) for "special exchange agreements" between the I.T.O. and such members of the I.T.O. who are not at the same time members of the Fund. This means further expansion of international exchange control.

38. *Proceedings and Documents* 1567.

39. *Ibid.* 54.

40. *Ibid.* 334, 341, 502.

41. *Ibid.* 543, 576.

42. *Ibid.* 808, 625.

The whole § 2 of Art. VIII now bears the caption "Avoidance of Restrictions on Current Payments." This reads as if the rule under discussion [§ 2(b)] should be confined to "current" payments. However, it would be preposterous to impart a greater international effect to restrictions on current transactions than to those on capital transfers. Evidently, the caption tallies only with Art. VIII § 2(a).[43] The inaccuracy is probably irrelevant legally, but it does not evoke much confidence in the accuracy of the draft.

We turn now to an examination of the text of § 2(b) (1).

(A) Already the first words "exchange contracts" confront us with a grave problem. That phrase is by no means self-explanatory.[44] "Exchange transactions" is more familiar and is used repeatedly elsewhere in the Agreement.[45] As was seen § 2(b) was originally likewise drafted in terms of "exchange transactions." Obviously "exchange contract" was supposed to have a narrower significance. This gives at least some hint at interpretation. Exchange transactions are generally understood to mean transactions which have as their immediate object "exchange," that is, international media of payment.[46] The meaning of exchange contracts cannot be broader. However, national enactments on exchange control often invalidate unlicensed contracts not directly concerned with international media of payment, such as unlicensed contracts for sale of foreign securities, or contracts for import or export particularly where the price is determined in foreign currency. Totalitarian governments—and one has to remember that Poland and Czechoslovakia are members of the Fund—will go at great lengths to extend their control.[47] It cannot be the meaning of the Agreement that the other member countries have to carry out such policies. The criteria of "ex-

43. *Supra*, n. 30.

44. It is subject to the Fund's interpretation according to Art. XVIII of the Agreement, *supra*, p. 528, n. 27 and 28, but only in a controversy between a member of the Fund and the Fund or between members; the Fund's power does not extend to private litigation in ordinary law courts, *supra*, p. 532. The question was touched upon but not decided, in *Kahler* v. *Midland Bank Ltd.* [1948] 1 All.E.R. 811, 819 (C.A.).

45. Art. IV § 3 and § 4(b); Art. XI § 2.

46. *Supra*, p. 446.

47. It so happens that the few reported cases in point are all concerned with Czechoslovakian exchange control. *Frankman* v. *Anglo-Prague Credit Bank*, *supra*, p. 466; *Kraus v. Zivnostenska Bank*, 187 Misc. 681, 64 N.Y.S.2d 208 (Sup.Ct.1946), and *Cermak* v. *Bata Akciova Spolecnost*, 80 N.Y.S. 2d 782 (Sup.Ct., 1948). Cf. also *Werfel* v. *Zivnostenska Bank*, *supra*, p. 467, n. 30.

change contract" have to be gathered from the Agreement itself. The latter is exclusively concerned with the handling of international media of payment as such. Contracts involving securities or merchandise cannot be considered as exchange contracts except where they are monetary transactions in disguise—an interpretation in accord with the legislative history of § 2(b) (1). Save for the exception indicated, those contracts do not come under § 2(b) (1). If invalid under the law of the "country of the currency", other countries are not compelled to hold them unenforceable.

(B) This approach is corroborated by another line of argument. § 2(b) (1) envisages "exchange control regulations . . . maintained or imposed consistently with this Agreement." As to "maintaining", Art. XIV § 2 explains that "members may . . . maintain . . . restrictions on payments and transfers for current international transactions" during the transitional period (restrictions on capital payments it was seen are permissible anyway). Consequently, Art. VIII § 2(b) (1) applies to regulations decreed, and contracts made thereunder prior to the establishment of the Fund. In other words, the rule has retroactive effect. This extraordinary feature in itself suggests vigilance in its application. It cannot be presumed that all of the exchange control regulations of the members are "consistent" with the Agreement. Significantly, in some of the cases mentioned, the Czechoslovakian regulations had been imposed in part by the Hitler régime after the conquest of Czechoslovakia.[48] The fact that the Fund has not disapproved an exchange regulation, proves nothing as the Fund has not entered into such an examination. In other words: Art. VIII § 2(b) (1) should apply only where the party interested in the invalidation can prove the consistency of the regulation invoked with the letter and spirit of the Agreement. The result will be similar to that indicated under (A).

(C) The situation is further complicated by the fact that Art. VIII § 2(b) (1) contemplates only exchange regulations of that member *whose currency is involved.* Here again an inaccuracy seems to have occurred. To give an instance, French control regulations would come under the rule only if French francs are involved. But the draftsmen of the Agreement should have envisaged rather French transactions in non-French, say English currency. Of course, if English pounds are bought in France, francs may be involved as the purchase price. Thus, after all,

48. In the *Frankman* and *Werfel* cases, *supra.*

French regulations would come in. But they remain outside the scope of § 2(b) (1) if pounds are exchanged in Paris, say for lire. This result does not make much sense. An attempt to explore the latter hypothesis in detail may lead into inscrutable bramble woods. Returning instead to the simple sale of pounds for French francs, French exchange control law we found has to be given effect. But what about English exchange control which is likewise involved? Suppose a Dutch court is confronted with the contract. In that case Dutch private international law will decide which legal system is applicable. If the contract was made in Paris French law will probably govern, so as to eliminate English law, including English exchange control law. The example reveals the practical significance of § 2(b) (1): Dutch Courts—provided they consider French law applicable—are barred from precluding, for reasons of Dutch public policy, the application of French exchange control regulations. Generally speaking, invalidation of "exchange contracts" under the law of the "country of the currency" must be recognized by member states regardless of their own "public policies."[49] Still, English and—to a lesser degree—American courts we know are reluctant to invoke "public policy" as a means of eliminating an undesirable foreign exchange-control law. Instead, they decline application of the foreign exchange-control law on the ground that the "place of payment" is outside the exchange-control country, or by way of strained interpretation of contracts or statutes.[50] The question is whether the Agreement compels unenforceability where according to the Conflicts rules of the forum the law of the country of the currency is out of the picture.

Thus Private International Law raises its mysterious head behind the Agreement. To the various puzzle games so significant in the theory of Private International Law, the Agreement has added another.

(D) The United States, England, Canada, the Philippine Republic and Costa Rica have in their enabling Acts[51] explicitly conferred the quality of internal law upon Art. VIII § 2(b) (1). Evidently, it is the theory of the governments of these countries that without such action the provision would be devoid of any actual effect and that therefore its "incorporation" is obligatory under the general rule of Art. XX § 2(a).[52] That theory seems

49. Accord: *Annual Report* 1949, 83.

50. *Supra*, n. 465.

51. References *supra*, pp. 527, 531. See furthermore "Bretton Woods Agreements Act" of the Philippine Republic of Oct. 15, 1945, Commonwealth Act No. 699, § 11, and of Costa Rica, Act of Dec. 24, 1945, no. 55, § 8.

52. *Supra*, p. 531. Accord: *Annual Report* 1949, 82.

to be fully justified as otherwise Art. VIII § 2(b) (1) would be a thing of nought; its incorporation is therefore necessary to "carry out" the obligations imposed upon the Government by the Agreement. This theory leads to a far-reaching conclusion regarding those countries which have failed to give Art. VIII § 2(b) (1) the force of internal law. Exchange regulations of the latter countries, it appears, are not "consistent" with the Agreement. Consequently, contract invalidation resulting from such regulations (the French, for instance),[53] does not fall under Art. VIII § 2(b) (1). Hence the Conflict norms of each member country will decide the question of enforceability or nonenforceability of the contract involved. In other words: the "consistency" requirement implies a reciprocity rule which is certainly appropriate to the situation.

(E) Perhaps the most important point in the analysis of Art. VIII, § 2(b) is that it provides only for international unenforceability of contracts void under foreign law. It does not impose upon the member states any obligation to give active assistance to the exercise of that control. A proposal to create such an obligation was defeated at Bretton Woods.[54] Hence Art. VIII § 2(b) does not prescribe recognition of all of the manifold effects which the exercise of national exchange control may have beyond the frontiers. This is especially true of the refusal of exchange authorities to grant the license necessary to the performance of an otherwise valid contract.

All considered, it appears that the statement of an English court,[55] "The Bretton Woods Agreement shows that such restrictions [namely, exchange restrictions of member states generally] are honored by the members of the International Monetary Fund" is far too broad. The line which the courts will actually follow is not yet visible, but one may doubt whether Art. VIII, § 2(b) (1) will assume any major importance.[56]

53. The French Acts of Dec. 26, 1945, *Journal Officiel* of Dec. 27, 1945, 8590, does not refer, directly or indirectly, to Art. VIII § 2(b) (1).

54. *Proceedings and Documents* 502, 543, 576.

55. In *Frankman* v. *Anglo-Prague Credit Bank* [1948] 1 All.Eng.R. 337, 342 (K.B.). In the House of Lords, *supra*, p. 467, n. 32a, the Fund Agreement was mentioned only in the opinion of Lord Simonds and he merely stated that the Czechoslovakian Act under consideration did not appear to differ materially "from the legislation contemplated by the Bretton Woods Agreement which is now part of the laws of this country." This remark—which simply refers to the letter of the Act—falls far short of the pronouncement of the court of first resort.

56. In *Cermak* v. *Bata*, etc., *supra*, n. 47, the court, disregarding

VI. Concluding Remarks

Substantially, the Fund carries on, more or less with American money, the function of the American Stabilization Fund, that is, the support of weak currencies of friendly nations. The position of these nations has been considerably improved by the fact that they receive this support as a matter of right and from an international organization of which they are associates. To this extent there will be little trouble. And the Fund's consultation assistance of its members is all to the good. On the other hand, the Fund binds its members with ties stronger and more numerous than those of any earlier monetary agreement. For the first time a formidable mechanism of exchange control is being imposed upon independent states from the outside. Still, independence cannot exist without the power to decide the major problems of monetary policies. In critical conditions a state that possesses national resolve and tradition will act here, as elsewhere, according to its own lights. This is the lesson of monetary history even from times in which nationalistic feelings were not so powerful as they are today. In the case of the Fund one may doubt whether the Fund's aid is worth its price. Moreover a government opposing the Fund may appear as an exponent of economic freedom. This places the Fund in an oblique position because its general philosophy is based on the notion of economic freedom, contrary to the Fund's actual operation. It is noteworthy that France's defiance of the Fund was not condemned by public opinion. In fact, it was widely acclaimed, even in this country and in England.[57] Many of the existing pitfalls could perhaps have been avoided, had the international organization in the monetary field been set up gradually in a selective and more flexible way.[58] At present the dollars flowing from the Marshall Plan have diminished the tension. Moreover, political developments seem to turn the Fund into a valuable link in the defense system of the Western Hemisphere. Such an evolution is bound to lessen resistance against compulsory measures. In any case the political factor will determine the fate of the Fund as it determined the fate of monetary agreements in the past.

Czechoslovakian exchange control regulations as foreign "revenue" law, refused to pass on the impact of the Bretton Woods Agreement on this subject until an appellate court had spoken. The argument, which of course is untenable, suggests a hesitation to subordinate inveterate American private law to international legislation.

57. See the excerpts in *Monetary Notes* (ed. by Spahr) of March 1, 1948. Generally, there has been much criticism of the Fund. Cf. *e. g.*, F. D. Graham, *The Cause and Cure of Dollar Shortage* (1949) 9. Nogaro, *La Monnaie et les Systèmes Monétaires* (2d ed., 1948) 154.

58. See the Article cited *supra*, p. 502, n. 1, at 257.

Section 39

THE NOTION OF WORLD MONEY

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I. From the Sixteenth to the Eighteenth Century [1]

The notion of world money originated in the Germany of the Reformation as a product of popular sentiment. It found expression in a poem transmitted to posterity in several versions, the following being the best known:

Hätten wir alle einen Glauben
Gott und Gerechtigkeit vor Augen
Ein Gewicht, Mass, Münz und Geld
Dann stünd' es wohl in dieser Welt.[2]

Budelius, mint warden of the Dutch city of Roermond, chose the proverb in the form of a Latin distich [3] as the motto of his celebrated volume *De Monetis et Re Nummaria* (1591) which remained the standard work on the subject for almost two centuries.

The first inquiry into the problem of world money, however, was undertaken in Italy, then the most advanced country commercially, which had contributed much to monetary practice and thought. We refer to Gasparo Scauffi's *Alitononfo* (1582).[4] Ali-

1. By far the best study on this subject is the Berlin thesis of Lucie Dresel, *Die Weltgeldidee bis zur Französichen Revolution* (1930). See also Trimborn, *Der Weltwährungsgedanke (Münchener Volkswirtschaftliche Studien, Heft 16,* 1931), and de Parieu (vice-president of the *Conseil d'Etat*) "L'Uniformité monétaire" in *Journal des Economistes, 3e Série, 2e Année,* VI (1867), 321, an uncited and sometimes inaccurate source for later writers, Schräder, *Die Idee des Weltgeldes* (thesis, Münster, 1928) is not helpful.

2. A free translation may be ventured:
Had we all the same belief,
God and justice before our eyes,
One weight, gauge, mint, and coin,
The world would suffer much less grief.

3. *Una fides, pondus, mensura, moneta sit una.*
Et status illaesus totius orbis erit.
This version was quoted in the *Mixt Moneys* case *supra*, p. 33, n. 6, 80 Eng. Rep. 508; Davis, 19.

4. Scaruffi's work is reprinted in Custodi, *Scrittori Classici Italiani di Economia Politica* II (1804), and in Aug. Graziani, *Economisti del Cinque e Seicento* (1913). Some inaccuracies of Custodi's publication have been pointed out by Miss Dresel, *supra*, n. 1. Her study is mainly devoted to Scaruffi's work. She has failed only in that the con-

tononfo is a stilted grecizing expression meaning True Light. Scaruffi was a wealthy banker in Reggio (Emilia, Northern Italy) who served his city for some years as mint warden and repeatedly as an agent in semi-diplomatic missions on coinage matters; for a short time he took over the Reggio mint as a contractor.[5] All in all, he was a consummate expert on money. His official relations gave him an opportunity to submit, on various occasions, projects for coinage reform to Italian princes. The *Alitononfo,* written at the suggestion of the Duke of Ferrara, was probably conceived as a systematic presentation of his reformatory ideas.

Scaruffi's plan is based on the idea of the *moneta imaginaria.* Scaruffi proposed that all of the current coins were to be incorporated into the *moneta imaginaria* system according to strictly scientific principles applicable all over the world. Money would then become uniform among all nations. Scaruffi's foremost postulate is the adoption of a definite weight unit—he proposes the weight of the "libra" of the Bologna mint—as the basis of the system. The coins were to be rated correctly according to the weight of the fine metal contained therein, though fractions below the value of a quarter of a denarius of *moneta imaginaria* could be neglected (a sensible qualification for Scaruffi's day). The value relation between gold, silver and copper was assumed by Scaruffi to be permanently 1:12:120 (the gold-silver ratio 1:12 was then generally taken as stable; Scaruffi considered it as God-given). Laborious coin tables illustrate the application of these principles and form the greater part of the work. According to Scaruffi, new gold and silver coins were to indicate, by their very imprint, not only their value in terms of the *moneta imaginaria,* but also in Arabic numerals their exact contents of fine metal. Scaruffi dubs his monetary unit *"lira imperiale",* a term familiar in Italy in another application,[6] but in Scaruffi's system reminiscent of universal empire. The proposal of the weight imprint was revolutionary enough, but it was far surpassed by Scaruffi's further demand that the princes ought to forego seigniorage and brassage—a vital part of their revenues. He expressed the conviction that princes all over the world would

nection of the work with the system of *moneta imaginaria* has not been brought into the necessary relief.

5. Andrea Balletti, Gasparo Scaruffi e la Questione Monetaria nell'Secolo XVI, in *Atti e Memoire delle R. R. Duputazioni di Storia Patria,* 3d Series, vol. I, part 2 (1883). A careful biographical sketch in Miss Dresel's study, p. 78. De Parieu (*supra,* n. 1) 332, calls Scaruffi a Count, an error repeated by other writers.

6. Namely, for coins made in mints operating by imperial privilege. Dresel, 30, n. 67.

nevertheless adopt his plan because of its self-evident virtues. He did not touch upon the aspects of international agreement and organization inherent in his scheme.

As was to be expected, the princes did not even consider, much less adopt, Scaruffi's project. One cannot believe that an experienced craftsman such as Scaruffi—who at one time had himself submitted to a prince a questionable plan for exploiting the coinage—should have been unaware of the political obstacles which his project was bound to encounter. The problem has baffled Scaruffi's biographers. However, his system had a definite theoretical value quite apart from the question of its adoption in practice (actually some of his points were borne out later). And there was nothing unusual in an Italian patrician of the sixteenth century vying for literary laurels. Apparently Scaruffi had even hired learned assistants for his work, a fact that seems to account for the pompous title and for some citations from the ancient classics. Scaruffi also had the book printed at his own cost. Later centuries have certainly shown that the expenses were not wasted from his point of view.

In contrast to Scaruffi, the famous French political scientist, Jean Bodin, presents the problem of world money primarily as an international one in his *Six Livres de la République* (1576).[7] He demands an agreement among the princes which would fix the permissible alloy for gold and silver coins as well as, it seems, a weight unit. (The emphasis on alloy is exaggerated; the determination of the quantity of fine metal in a given coin is more important.) Generally, he considers princes to be bound in monetary matters by the law of nature, again a supranational conception. Like Scaruffi, Bodin assumes a common gold-silver ratio of 1:12 as a matter of course. His observations on the subject of coinage are only incidental and cursory, but they have influenced later writers far more than Scaruffi's elaborate studies which were too technical and too much tied to the doomed system of *moneta imaginaria.*

Bodin's influence appears, for instance, in the work *El Governador Cristiano* (The Christian Ruler) published in 1612 by the Spanish monk Juan Marquez, confessor of Philip III.[8] Marquez makes the new but erroneous assertion that the unified regulation of alloy in connection with the universal gold-silver ratio of 1:12 would save the people the trouble of money changing, but

7. Book VI, chap. 3, is in point.

8. The book was not available to me. I have used the extract in Dresel, p. 58.

otherwise he seems to have added nothing to what was said before. More interesting are Bodin's French successors. With Emery Crucé the "world money" idea appears as an element of a vast project for securing universal peace *(Le Nouveau Cynée,* 1623).[9] Crucé tries, not very successfully, to implement some of Bodin's ideas by proposing that the princes should take the grain of a definite country as a basic coinage weight and that copper coins should be replaced by small silver coins. In contrast to both Scaruffi and Bodin, Crucé is a dilettante in monetary matters. Politically his project as a whole tends toward French leadership,[10] a conception that was destined to assume greater significance later.

The idea of world money appeared in the more definite form of world coins, that is, of universal media of payment, in a remark made by Louis XIV's famous Marechal Vauban in 1690.[11] Crucé's approach was revived by the Abbé de St. Pierre, well known herald of universal peace, when he postulated—with involuntary irony—a universal monetary system together with a universal calendar, universal measurement, universal language, and universal arbitration of international disputes.[12] The French Revolution replaced the framework of universal peace by the program of social institutions rationally planned for the greater happiness of mankind and for the progress of nations. In this sense the notion of world money was referred to, though in a general and perfunctory way, by Mirabeau and by Talleyrand,[13] the former expressing the hope that France's example might inaugurate a happier era of monetary unification. A few years earlier, in 1787, Hegewisch, Professor of History at the University of Kiel, writing in the spirit of the brewing revolution, had published a somewhat detailed proposal for an international agreement on the coinage standard.[14] Following French doctrine, he started from the theory that money is a commodity, and from other "ev-

9. An English translation of Crucé's work in Balch, *The New Cyncas of Emeric Crucé* (Philadelphia, 1909).

10. Cf. the writer's *Concise History of the Law of Nations* (1947) 94. Regarding monetary matters, Crucé considered the King of France (for good reasons, incidentally) called upon to win the Sublime Porte over for the planned Convention.

11. *Mémoire sur le Canal de Languedocz,* "Monnaie," in De Rochas d'Aiglun, *Vauban, sa Famille et ses Ecrits,* I (1910), 561.

12. *Ouvrages de Morale et de Politique* (1733–41), XIII 223.

13. For references, see Dresel, 67, 72.

14. Hegewisch's pamphlet was reprinted and critically analyzed by the Hamburg economist, J. G. *Büsch, Sämtliche Schriften über die Handlung,* III (1824) 302, 190. A summary in Trimborn, *supra,* n. 1, at 40.

ident" truths. Practically, he emphasized in the first place—one is reminded of Marquez—that adoption of his plan would eliminate the troubles of money-changing and especially the fluctuations of the rate of exchange—a layman's mistake, as Hegewisch's economist critics were quick to point out, because despite the identity of standard, the diversity of economic and political conditions of the various countries might attract or drive out the coin, particularly under a gold-silver parallel standard as proposed by Hegewisch. The new French Republic did not adopt or promote the world money ideology though it greatly improved the universal monetary mechanism by introducing the decimal system into Europe.

II. The Nineteenth and Twentieth Centuries

During the nineteenth century France long remained the foremost scene of the debates on world money. Affiliation of that concept with the notion of French hegemony became more pronounced. Napoleon I told his minister Fouché shortly before the outbreak of the Russian War, that money, weight and measure ought to be the same throughout Europe, adding that he must make the European states a unified nation with Paris as the capital of the world.[15] In St. Helena he reverted to the idea that weight, measure and money must be unified, but without that grandiose addition.[16] It was in the Bonapartian tradition that Napoleon III inaugurated in the 60's, a broad political action culminating in the establishment of the Latin Monetary Union which, as pointed out earlier in this volume,[17] was conceived as the nucleus of a universal monetary system. Inspired by this idea, Napoleon convoked an International Monetary Conference, held in 1867 in Paris.[18] The purpose was to win over to Napoleon's plan the non-Union countries, and especially the leading commercial nations. All of the great powers were represented, but despite the warm support by the American delegate, Ruggles, the Conference proved a complete failure. Up to that time the world money idea had found distinguished sponsors among French scholars; [19] afterwards it lost its hold on the French mind and disintegrated entirely. Monetary ideas of universalist "tinge" came to be interlarded in bimetallistic doctrine because

15. W. Scott, *Life of Napoleon*, V (1828) 104.

16. Albert Janssen, *La Monnaie Internationale* (1928) 4.

17. *Supra*, p. 507.

18. *Conférence Monétaire Internationale, Procès-verbaux* (1867).

19. For instance, M. Chevalier, *La Monnaie* (1850) 566, and particularly, de Parieu, *supra*, n. 1.

national bimetallism was soon recognized as impossible.[20] Besides, world money became even more than in the past, a favorite topic for political dreamers and inventors. In fact, an association, anticipated by St. Pierre, developed between world money and Esperanto, hoped-for world language.[21] Evidently, the notion of world money somehow appeals to human fantasy all the more as it lends itself to ostensibly scientific elaboration. A quasi-scientific system, for instance, was published in 1900, by the Austrian-American Pamperl in a pamphlet *Universalgeld auf Grundlage des Metrischen Gewichts und des Monometallismus*[22] ("Universal Money on the Basis of the Metric System and of Monometallism"). Invoking Kant, Spinoza, Franklin and other thinkers, and sometimes elevating himself to poetry, the author represents his universal money as a step to "universal harmony," though he proposes silver as the standard metal. Innumerable are the new names proposed by the inventors for their new world units: "grammer," "grammor," "lir," "unité," "deca," "iva" (from International Valuta Association), "spesmil" (Esperanto),[23] etc. Some of the projects had, in a measure, economic substance, as, for instance, the proposal of an international bank note by the German economist Julius Wolf,[24] but not a single one had a chance of practical realization.[25] While international regulation of national monetary systems has long been on its way, the notion of "world money" has proved sterile.

20. See Trimborn, *supra*, **n.** 1, at 62.

21. Trimborn, 69.

22. In the preface the author introduces himself as an American citizen.

23. These instances are gleaned from Trimborn, passim. Remarkably, the draftsmen of the International Monetary Agreement could not resist the temptation to introduce what seemed to be new world monetary units. The American draftsman (White) proposed "unitas," the English (Lord Keynes) "bancor." This terminology, objected to by the writer in Am.J.Int.L. 1944, 257, was abandoned in the definitive version of the Agreement.

24. "Die internationale Banknote," *Zeitschrift für Sozialwissenschaft*, 1908, 44. The critical problem, of course, was that of redemption. See also Lippert, *Internationales Finanzrecht* (2d ed., 1928), § 145.

25. In 1874 the United States Mint prepared a sample for an international gold coin carrying the inscription "Dollars 10/Sterling £2.1.1/Marken [*sic*] 41.99/Kronen 37.33/Gulden 20.73/Francs 51.81." *Catalogue of Coins, Tokens and Medals* (U. S. Mint, 1914), 19, 86, and Plate VII 5. That coin was manufactured on the suggestion of an American citizen traveling abroad who found the business of exchanging money troublesome. There was no general theory or movement behind this occurrence. See W. H. Wooden, *United States Pattern, Trial and Experimental Pieces* "1874." The writer is indebted to Mr. Leland Howard, Washington, D. C., Acting Director of the Mint, for this reference and for further information.

ANNEX

LEGAL HISTORY OF AMERICAN CURRENCY

Section 40

THE COLONIAL PERIOD [1]

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I. Conflicting Interests

In monetary matters the American Colonies, part of the British Empire, were subject to the prerogative of the Crown and to the legislative power of Parliament. The exercise of the homeland's supremacy was determined by economic conditions and English interests. A paramount factor in the monetary picture was the permanent scarcity of coins all over the colonies. This fact operated to depress prices of colonial goods, to enhance the rate of interest, and generally to obstruct the economic development of the country. At the same time the situation was favorable to the homeland, which needed tobacco, sugar, rice, and other colonial exports on favorable terms and looked askance at the rise of a rival colonial industry. It is true that during the seventeenth century England's own currency was in poor condition and that in the eighteenth century the means of supplying the colonies with adequate coin were still limited. But beyond these difficulties the home government followed a negative and prohibitive policy toward the monetary evolution of the American colonies—a policy that found its most conspicuous expression in 1684 when the home government closed the Massachusetts mint,

1. Bullock, *The Monetary History of the United States* (1900) and Nettels, *The Money Supply of the American Colonies before 1720* (1934) are outstanding. Professor Nettels' book, despite the narrowness of its title, presents, on broad economic grounds a penetrating exposition of early colonial conditions. See, furthermore, Weeden, *History of New England* (2 vols., 1890), passim; *Palgrave's Dictionary of Political Economy* (1926), "Currency in British colonies" and "Denominational currency"; Gragnani, *La Moneta nelle Colonie Ing-*

the only colonial mint ever established.[2] Another cause of friction was the colonial indebtedness to the mother country. This was due to the purchase of English manufactured goods which the colonists needed lest a European standard of living be abandoned, and to the general use of English shippers and agents made necessary by the Navigation Acts. Moreover, interest on English investments, heavy English import dues, quit-rents to English patrons, and other payments to England had to be satisfied.[3] Therefore, the colonists, as a whole, became a debtor class and soon developed an inflationary tendency which was contrary to English interests.

The monetary controversies originating in economic antagonism proved a powerful factor in the revolutionary movement.[4] From the angle of the present study another effect of the conflict is perhaps more remarkable. The monetary difficulties taught the colonists the use of makeshifts and evasion. Numerous legal problems sprang up which often gave rise to Colonial legislation and sometimes to adverse action on the part of the home authorities. Colonial courts, too, played a certain if less important role in this development. The inclination of the colonists toward monetary experimentation and inflationary complacency evolved into an American heritage which has greatly influenced events of the post-colonial era.

II. Commodity Money

The principal need and desire of the colonists was the creation of money substitutes. In this respect their versatility was amazing indeed. One of the earliest money substitutes consisted of certain products of colonial agriculture and industry, such as tobacco (Maryland, Virginia), rice (South Carolina), wheat, beef, pork (Northern colonies) and beaver skins (New York, Connecticut).[5] They were made receivable in payment of taxes

lese del Nord-America, 1706–1776 (Bologna, 1935), a study showing no new facts or vistas, but illustrating the widespread interest in American monetary history. Valuable bibliographical data are found in Dewey, *Financial History of the United States* (11th ed., 1932).

2. See *infra*, n. 21. Another irritating event was the destruction of the Massachusetts Land Bank through parliamentary action. *Infra*, p. 561.

3. See Andrews, *The Colonial Background of the American Revolution* (1924), 122, 134, 137, 138.

4. See, *e. g.*, *infra*, ns. 7, 44.

5. Nettels, *supra*, n. 1, at 210, 211. Transactions were also made in terms of "shillings of merchantable goods." This referred to commercial, especially Boston usage. Even judgments were rendered in such terms. Maine Historical Society, *Province and Court Records of Maine*, II (1931) xl; III (1947) 71

and other public dues at rates fixed by the respective legislatures. Frequently this so-called "country-pay" was by custom or statute, legal tender. "Country-pay" therefore, although not real money, was distinguished from mere objects of barter.

"Country-pay" generally degenerated because the poorest quality was used in payments. This process was inflationary in nature; and so was the habit of the colonial assemblies to overrate the commodities payable on public dues.[6] Nevertheless, country-pay was employed far into the Eighteenth Century. As late as 1762 a Virginia law on tobacco currency gave rise to a celebrated lawsuit foreshadowing revolutionary events.[7]

Closely related to country-pay was the famous wampum, strings of small perforated shell beads. Originally used by the Indians in various forms for ornaments, it was later employed by the early settlers as a convenient means of barter with the Indians and came gradually into general use. Consisting of homogeneous and comparatively durable units, it reveals definite money-like features, and at the same time makes graphic the role of the ornament element in the evolution of media of ex-

and passim. Chalmers, *A History of Currency in the British Colonies* (1893) 6 n., tells the following curious story from an early American source: "'Young and uncorrupted girls imported into Virginia in 1620 and 1621 as wives for the colonists, were rated originally at 100 pounds of tobacco (£15), but subsequently at the increased price of 150 pounds (£22. 10s). 'The Rev. Mr. Weems, a Virginian writer, intimates that it would have done a man's heart good to see the gallant young Virginians hastening to the waterside, when a vessel arrived from London, each carrying a bundle of the best tobacco under his arm, and taking with him a beautiful and virtuous young wife.'"

6. In private payments the market price, which was to be finally determined by umpires, seems to have prevailed. Nettels, *supra*, n. 1, at 211.

7. By a Virginia law of 1758 (c. VI, 7 Hening 240) public dues stipulated in tobacco currency (*infra*, p. 562), had been rendered dischargeable in money at the rate of two pence per pound of tobacco, the real value of which amounted to about six pence. The law especially injured the clergy whose salaries were fixed on a tobacco basis. In a suit brought by several clergymen in 1762, after the royal disallowance of the law (*"Parson's Cause"*), Patrick Henry, who later became a prominent figure in revolutionary developments, made his first public appearance as counsel for the defendants. He violently attacked the clergy and the King, declaring that the latter, by his disallowance of a "salutary law," had "degenerated into a tyrant" and had "forfeited all rights of obedience." The jury rendered a verdict of a penny damages, thus recognizing and at the same time scoffing at the King's prerogative. A motion for a new trial was unanimously overruled by the court. Bancroft, *History of the United States* (last revision), III 65; Osgood, *The American Colonies in the 18th Century* III, (1924),

change. In 1643 it was declared legal tender by Massachusetts [8] and other colonies followed her example.[9] Even judgments were rendered in terms of "shell money." [10] The flourishing period of wampum was brief, however. As early as the middle of the seventeenth century it lost its significance.[11] Its decline was caused by large scale counterfeiting through use of spurious material and by the increasing appearance of coins.[12]

III. Coins

Only a small amount of English coin entered the colonies, remittances from England being usually made through bills of exchange.[13] Such coin did not remain long on American soil because of the adverse trade balance with England.[14] Instead, foreign coins circulated. Among silver coins, Spanish and Mexican pesos, or "dollars",[15] were by far the most numerous.[16] They

481; Wirt, *Sketches of the Life and Character of Patrick Henry* (1818) 20.

8. Weeden, *supra*, n. 1, at I, 32; Bullock, *supra*, n. 1, at 7; Rosendale, "Wampum currency" in 3 *Sound Currency* 483 (1896).

9. Breckinridge, *Legal Tender* (1903), 54, ns. 1 and 2.

10. *Public Records of the Colony of Connecticut* (1850) 193 [judgment of 1650 on a wampum basis in terms of £]; Weeden I 42.

11. Except that it continued for sometime to circulate locally as small change, especially in New York. Weeden I 44, Bullock 9.

12. Bullock 8.

13. See, *e.g.*, Nettels 165.

14. After the sixties of the eighteenth century this calamity was enhanced by Acts of Parliament imposing on the colonists duties in terms of sterling and payable in hard money. Andrews, *supra*, n. 3, at 133, 134, 137.

15. The name "dollar" is of German origin. When, at the close of the Middle Ages, a demand for gross silver coin, symptomatic of economic growth, appeared in Germany, such a coin was struck in 1517 from the output of the silver mine at Joachimsthal in Bohemia. This coin, called *Joachimsthaler* or shortly *thaler*, became, in 1566, as the *Reichsthaler*, an imperial coin, and was exported to England where the anglicized name "dollar" became customary for foreign silver coin of about the *thaler's* size and value. The name "Spanish dollar" was imparted to the Spanish *peso*, the fine silver contents of which were practically equivalent to the *Reichsthaler* (rix-dollar) and which was outstanding among the contemporary silver coins. "The Spanish money has long been considered the first money of the world, recognized as such both by the philosopher and by the merchant", (Chevalier, *La Monnaie* III [2d ed., 1866] 183, discussing monetary conditions of the eighteenth century.) There were some subspecies of the Spanish dollar, among them the *pillar dollar*, mentioned in Queen Anne's Proclamation (*infra*, n. 22) and still named in 11 Stat. 163 (1857), 31 U.S.C. 374 (*infra*, p. 576, n. 55); it derives its name from the two pillars portrayed on the reverse side of the

16. See page 556.

were also called "pieces of eight," [17] because they were divided into eight *reales*. Foreign coins were obtained chiefly from the flourishing trade with the Spanish West Indies; and not unimportant was the fact that, until their activities were suppressed early in the eighteenth century, the pirates used to spend their loot in American ports.[18] The various colonies proceeded to rate the current foreign coins in terms of pounds, shillings, and pence at rates exceeding sterling parity (*e.g.*, in Massachusetts by a third), a policy partly explainable by the general underweight of the circulating sterling coins. The competitive desire of the several colonies to attract coin intensified the inclination to "raise" their rates. All the officially rated foreign coins were considered "current [19] lawful [20] money" equivalent to sterling money and possessing the quality of legal tender. Indigenous silver coins were issued only by the Massachusetts mint which, founded in 1652, was closed in 1684 by the home government as violating the coinage prerogative of the Crown.[21] The coins, called "pine-tree shillings" because of their design, were issued in pieces of 12d, 6d and 3d, and were legal tender at their face value though 100 English shillings contained as much silver as 129 pine-tree shillings.

coin said to represent the "Pillars of Hercules". See Sumner, "The Spanish Dollar and the Colonial Shilling" 3 *Am. Hist. Rev.* 607 (1898). The rather fantastic story of the genesis of the dollar, told by Del Mar, *Money and Civilization* (1886) 105 has been replaced, in the same author's *History of Monetary Systems* (1903) 357. But the second account seems no more plausible.

16. Among the other coins referred to in colonial statute books the Portuguese *Johannes'*, Portuguese *Moidores*, the Spanish and the French *Pistoles*, and the Arab *Chequins*, all gold coins, may be mentioned. See, *e. g.*, *Laws of Maryland* (1781), ch. 16. A historical curiosity is found in the *South Carolina Statutes* of 1932, § 1505, repealed in 1941. They preserved a provision enacted in 1788, making punishable the counterfeiting of "a Spanish milled dollar, Johannes half ditto, quarter ditto, eighth ditto, French crown of four to the Louis d'or, English crown, pistareen, Spanish doubloon, double pistole, pistole, half ditto, English guinea, half ditto, quarter ditto, French guinea, German piece, half ditto, ducat . . . "

17. A more recent example of a judicial reference to this term is *Mather* v. *Kinike*, 51 Pa. 425 (1866) [ground rent of 1773]. For an English example, see *Gold* v. *Canham*, 2 Swans. 640, 36 Eng.Rep. 640 (1678–79); in 1 Cas. in Ch. 312, 23 Eng. Rep. 816 (same case), the coin is called "dollar."

18. See Nettels 88.

19. That is, actually circulating, in contradistinction to English shilling coins.

20. *Supra*, p. 55.

21. Nettels 171, 174; Bronson, *A Historical Account of Connecticut Currency* (1863) 13; Sumner, "Coin Shilling of Massachusetts Bay," 7 *Yale Review*, 247, 405 (1898). There seems to have been some spurious copper coinage in Connecticut, Nettels 175.

The home government tried to remedy the confused monetary situation through orders rather than through supply of good money. In 1704 Queen Anne, by Proclamation, prescribed uniform maximum rates for foreign coins circulating in the American dominions.[22] To a certain extent the Proclamation yielded to the American demands for higher rating by distinguishing between the "just" and the "current" (that is, maximum) rate. For example, the Spanish dollar was allowed to circulate at 6 shillings despite a "just proportion" of 4 sh. 6d. For constitutional reasons[23] the royal Proclamation did not inflict penalties for violations, merely threatening royal disfavor to offenders. Although mandatory upon the Governors and other officials of the Crown, it did not change the law of the land.[24] This made it all the easier for the colonies to defy the royal demands which did not grant the desired latitude in rating. Even when Parliament in 1708 put prison and fine sanctions behind the Proclamation in all the American colonies,[25] the latter, except Virginia and Maryland, frustrated the law by disobedience or evasion. To give an example: while the Proclamation was drawn in terms of Spanish dollars, the colonies would rate the ounce of silver instead, and impart to it a higher value than that corresponding to the proclaimed dollar rate.[26]

IV. Paper Money

The foremost monetary field in which the settlers displayed their ingenuity and cunning was that of paper money. In fact, Massachusetts has probably the merit or demerit of having given birth several decades before John Law, to the first paper money in western civilization, and to government paper money at that.[27]

22. See Nettels 242. The text of the Proclamation was embodied in the Act of 1708, *infra*, n. 25.

23. See Nettels, 245, referring to an unprinted opinion of the English Attorney General.

24. This probably explains why in 1705 Massachusetts courts disregarded the Proclamation by employing the higher Massachusetts rate of the pieces of eight. Nettels 243, n. 25. Professor Nettels does not give particulars concerning these cases.

25. 6 Anne, c. 30.

26. See Nettels 246; Bullock 20. New York also prescribed different rules for clipped and unclipped coins, a scheme vetoed by the home government, but illustrative enough.

27. Laughlin, *Money, Credit and Prices* II (1931) 104; Bronson, *supra*, n. 21, at 27; Felt, *An Historical Account of Massachusetts Currency* (1839) 50.

In 1685 and 1686 the Canadian *Intendant*, a high official under the Governor General, issued, originally on his own credit and as pay to the soldiers, circulatory notes redeemable at the (imminent) arrival of the next shipment of funds from France; they were declared receivable by everybody at their face

Issued in 1690 in order to finance the war against Canada, these "bills" or "bills of credit", expressed in round sums, did not bear interest and did not provide for a definite time of redemption, but were declared "to be in value equal to money and shall be accordingly received by the Treasurer . . . in all public payments." In 1692 public receivability was replaced by the legal tender feature.[28] This, then, was a new type of "current lawful money." Thereafter "bills of credit," in a great variety of forms and sometimes limited to public receivability, spread rapidly over the American colonies.[29] Many abuses occurred through over-issuance, postponement of redemption, counterfeiting and in other ways.[30] For the most part the value of the bills of credit was below the coin standard of the issuing colony,[31] but on the whole the bills proved beneficial to economic development; in fact, they were necessary for the colonies.[32]

After "Queen Anne's War" (1702–1713) depreciation became heavier in Massachusetts and elsewhere,[33] but prior to the Revo-

value. Because of paper scarcity the notes were made out on playing cards. This "Playing Card" currency was disapproved by the French home government but has probably influenced the Massachusetts authorities. Shortt, *Documents Relating to Canadian Currency, Exchange and Finance During the French Period,* I (1925), xlviii and 68; Lester, *Monetary Experiments* (1939) 38.

28. 1 *Acts and Resolves of the Province of the Massachusetts Bay,* 1692–93, c. 7, sec. 1.

29. Nettels, 264. See also Mr. Justice Story in *Briscoe* v. *Bank of Commonwealth of Kentucky,* 11 Pet. (36 U.S.) 257, 333, 9 L.Ed. 709, 928 (1837). Details on a great many of colonial paper moneys with illustrations are found in *Encyclopedia Americana* under "Money, Paper."

30. See, *e. g.*, Bullock, *supra,* n. 1, at 38.

31. In *Deering* v. *Parker,* 4 Dall. (4 U.S.) append. xxiii, 1 L.Ed. 925 (1760), a Privy Council case from New Hampshire, the parties in 1735 had stipulated in New Hampshire a payment of £2460 in good public bills of the Province of Massachusetts Bay, "or current lawful money of New England." In 1752, bills of credit, then current in New Hampshire, were tendered to the creditor. Contrary to the opinion of the Chancery Court of New Hampshire the Privy Council on appeal held (apparently) that there was no current lawful money *of New England* except coins under the Proclamation of Queen Anne, and that the creditor therefore was not obligated to accept bills of credit of a single colony. Another problem of the case was the conversion of colonial into English pounds for fixing the amount of the judgments. Lord Mansfield, a member of the Council, confessed to be "at a loss" in this respect. The problem was solved by a kind of Solomonic judgment. The case does not have much authority. See Mann, *The Legal Aspect of Money* (1938) 70.

32. This view has now been generally accepted. See particularly Lester, *Monetary Experiments* (1939), 141. Benjamin Franklin was one of the defenders of bills of credit. Lester 144, 306; Bullock 59.

33. Nettels 267; Felt, *supra,* n. 27, at 63; Bullock, *supra,* at 39.

lutionary War, inflation did not assume the "pernicious" character of later periods.[34] Nevertheless, as far as it went it injured the interests of the creditors and particularly of English investors. At the same time the disorder created by the multitude of bills of credit, and the threat of more dangerous excesses constituted a challenge to the home government. Legally the situation was not as simple as in the case of coins. The prerogative of the Crown was confined to coinage. A bill of credit was looked upon in England not as money, but as a kind of promissory note issued by a body similar to a chartered company.[35] Hence Parliament was called upon to intervene. In 1751 it forbade the issuance of new bills of credit except for current expenses of the colonies and extraordinary emergencies such as war and invasion.[36] Circulating bills of credit were required to be called in immediately and to be discharged according to their terms, all Acts and Resolutions to the contrary being declared null and void in advance. To the extent that new issues were allowed, they were not to be legal tender.[37] Granting of public receivability was not prohibited and was expressly permitted in 1773,[38] thus settling the validity of circulatory treasury notes. The Act of 1751 was confined to New England where the abuses first developed, but was extended to the rest of the colonies by Parliamentary enactment of 1763.[33]

These measures were efficiently enforced throughout the colonies. It is true that the exemptions provided by the Parliamentary Acts were utilized on a large scale so that, in 1774, between one-half and three-fifths of the circulating currency, estimated in face value at 12 million dollars or, in silver value, at 10 million dollars, consisted of paper money.[40] New issues were, however,

34. With the exception of Rhode Island, *infra*, p. 561.

35. Nettels 276. One is reminded of the French theory of bank notes, *supra*, p. 72.

36. 24 Geo. II, c. 53. ("An Act to regulate and restrain Paper Bills of Credit in His Majesty's Colonies or Plantations of Rhode Island and Providence Plantations, Connecticut, the Massachusetts Bay, and New Hampshire in America, and to prevent the same being legal Tenders in Payments of Money.")

37. The legal tender effect of the bills was, of course, the main grievance of the English merchants. They found strong support in the Privy Council which as late as 1764 felt that "the art of men cannot contrive any measure more ruinous and destructive to the unhappy country where it is allowed to take place." 4 *Acts of the Privy Council, Colonial Series* (1911) 624, 629.

38. 13 Geo. III, c. 57, employing the term "legal tender to the public treasurers," a phraseology no longer accurate.

39. 4 Geo. III, c. 34.

40. Pelatiah Webster, *Political Essays* (1791) 142.

no longer made legal tender,[41] and the term "bills of credit" was avoided.

In contrast to developments in most other countries, government notes preceded private bank notes in the colonies. In fact, such notes were practically non-existent. The only major experiment with bank notes was undertaken in 1740 by the Land Bank of Massachusetts, founded for the purpose of issuing circulatory notes on the security of land.[42] However, as early as 1741, Parliament intervened by extending to the American colonies the famous Bubble Act which prescribed the incorporation of all joint stock companies by the Crown or by the legislature.[43] The extension to the colonies was carried out with retroactive force by way of a legislative interpretation of the Bubble Act. Though the basic scheme and the ways of the Land Bank were open to criticism the proceeding of the home government which practically put an end to the issuance of private bank notes aroused deep resentment in the colonies.[44]

The general picture presented may be implemented by an account of a few outstanding phenomena of more local significance: the Rhode Island inflation and the tobacco notes of Virginia and Maryland.

Inflation in Rhode Island[45] was much worse than in other colonies, owing to the heavy influence of the debtor class and to a more radical political tradition. Notes issued by Rhode Island in 1740, later called "old tenor" lost so much in value that in 1771 £8. "old tenor" were accepted by the state Treasury in payment of taxes for 6 shillings "lawful money," a depreciation of almost 96%.[46] Events in Rhode Island after the Revolutionary War are still more notorious. Despite the bad state of public finances the Rhode Island Assembly carried in 1786 a law provid-

41. On an isolated exception (reissuance of old legal tender notes in South Carolina), see Bullock at 45, n. 2.

42. The main work on the subject is by A. M. Davis, *Currency and Banking in the Province of the Massachusetts Bay*, II (1901).

43. 14 Geo. II, c. 37. As to the genesis of the Act, see in addition to Mr. Davis' study, 3 *Acts of the Privy Council, supra*, n. 37, (1910) at 683.

44. Davis 256.

45. E. R. Potter, *Some Account of the Bills of Credit or Paper Money of Rhode Island* (1880); Davis, *supra*, n. 42, I (1900), 330; Bullock, *supra*, n. 1; and Weeden, *supra*, n. 1, passim.

Public loans given in bills of credit were called "banks" in Rhode Island, but these bills were not bank notes in the modern sense.

46. The Mass. Public Act 1743–44, c. 8 (3 *Acts and Resolves of the Province of Massachusetts Bay* 122) barred the importation of Rhode Island paper money.

ing for large loans of paper money to real estate owners. When the money was widely repudiated the Assembly resolved that repudiators should not only be subject to heavy fines, but be unfit for any office of honor or trust. As this measure proved ineffective, the Assembly instituted, as did Hitler a century and a half later, an emergency tribunal for the speedy punishment, without jury or appeal, of violators of the monetary law. However, when a butcher named Weeden was brought into court for having refused to sell meat to a certain Trevett for the new bills, the court unanimously held the law unconstitutional.[47] The Assembly thereupon constituted itself into a tribunal taking the judges to account because of their disobedience toward legislation duly enacted by the Assembly. The procedure was not carried through but four of the judges, it seems, were not reelected. The case *Trevett* v. *Weeden* is in American monetary history the first instance of a clash, on the basis of principle, between the legislative and the judicial branches of the government. The reprehensible laws were soon repealed and the new bills were called in fifteen to one.

The tobacco notes of Virginia and Maryland[48] are interesting from an opposite point of view. They present an outstanding example of constructive and legally noteworthy colonial inventiveness. The use of tobacco as a commodity money caused serious difficulties because of the variations in quality, the tendency of debtors to pay in the poorest quality, and the ensuing expansion of tobacco cultivation. As early as 1632 warehouses were erected in Virginia in charge of appointed keepers whose duty it was to "overlook" tobacco before payment by a transfer of book credits was made. This system was greatly improved in 1713 by the building of public warehouses and the creation of transferable tobacco notes to be issued by the inspectors of the warehouses, upon delivery of first-grade tobacco. These were probably bearer notes, giving the holder the right to receive from the inspector on demand the quantity of first-grade tobacco

47. Varnum, *The Case of Trevett* v. *Weeden* (1786); Chandler, *American Criminal Cases* (1844) 267; cf. also N. Angell, *The Story of Money* (1925) 261. In *Mumford* v. *Wright*, Kirby (Conn.) 297 (1787), it was held that under Rhode Island law, the notes were legal tender only for Rhode Island citizens. The creditor being a Connecticut citizen, the court did not enter the question as to whether it would have otherwise to apply a law "which we apprehend to be unjust."

48. Brock, "A Succinct Account of Tobacco in Virginia" in U. S. Census Office, *10th Census*, III (1883), 212, 219; Ripley, *The Financial History of Virginia* (1893) 145; Royall, "Virginian colonial money," 1 Va.L.Rev. 447 (1877); Nettels, 214.

indicated in the note, though the holder had no lien on particular casks.[49] The notes were designed to serve as, and actually became, a circulating medium. They were declared to be a "legal tender" in "tobacco debts"[50]: *i. e.*, they had to be accepted by the obligee where payment was stipulated in terms of tobacco. The terms "debt" and "legal tender", were not quite correctly used in these instances.[51] While the fluctuations of the tobacco market caused grave disturbances, the tobacco currency lasted fairly well. Not being "bills of credit", the tobacco notes were not prohibited by the English Act of 1763 and the Federal Constitution. As a matter of fact, because of their similarity to warehouse receipts, they offered a security absent in "bills of credit" and actually proved an antidote to paper money inflation. Maryland adopted the Virginia regulation in 1748 with the result that the tobacco notes became "the great currency" of Maryland.[52] Unlike Virginia,[53] Maryland clung to the tobacco currency after the creation of the American dollar.[54] In 1801, a law was re-enacted in Maryland regulating the inspection of tobacco and declaring the tobacco notes to be legal tender for tobacco debts;[55] the constitutional provision forbidding the states to make anything but gold and silver coin a tender in payment of debts [56] was probably interpreted as referring to pecuniary debts. Maryland judgments phrased in tobacco currency appear as late as 1828 [57] although, in 1812, the Maryland legislature had ordered

49. Ripley, *op. cit.*, 149.

50. Va. Laws of 1742, c. 1, § 18 (5 Henning 124 at 134). The legal tender effect was limited to the environment of the warehouse from which the note was issued, Ripley, 149. There is no such limitation in the Maryland Act of 1801, *infra*, n. 55. It has been alleged that under a Virginia law of 1742 all contracts were to be made in terms of tobacco, but the writer has been unable to verify this statement.

51. *Supra*, pp. 45, 139.

52. Brock, *supra*, n. 48, at 221, note g, and 223. In North Carolina the principle underlying the tobacco notes was extended to various "rated" commodities, but without lasting success. Bullock, *supra*, n. 1, at 157.

53. See Ripley, 152. A case concerning a 1781 transaction in Virginia tobacco notes is *M'Connico v. Curzen*, 2 Call. (Va.) 358 (1800).

54. Fees and salaries of public officers, including court clerks, attorneys and sheriffs were fixed in terms of tobacco. Therefore judgments as to cost were rendered in terms of tobacco though the principal was expressed in money. The value of a pound tobacco currency, however, was fixed by the law in Maryland currency. *Purviance* v. *Neave* et al. 4 Harr. & McHenry (Md.) 199, 201, 204 (1798).

55. Md. Laws 1801, c. 63, amended by Laws of 1804, c. 85.

56. Art. I, sec. 8.

57. In *Crain* v. *Yates*, 2 Harr. & G. (Md.) 332 (1828), and in *Laidler* v. *The State, Use of Hawkins*, 2 Harr. & G. (Md.) 277 (1828). See also *Lyles* v. *Lyles Ex'rs*, 6 Harr. & J. (Md.) 273 (1824).

the courts to render judgments in terms of dollars.[58] The tobacco notes seem to be the only somewhat successful paper money ever based on the produce of the soil.

V. External Relations

As has been seen, each colony had a monetary system of its own which consisted, after commodity money had vanished, of Spanish dollars and other foreign coins rated in terms of the colony's unit. The unit was a pound with its subdivisions, but a pound different from the English. The ratio between a colonial, say the Massachusetts pound, and the English, was ordinarily determined on the basis of an equation between the silver contents of the English shilling and of that part of the dollar's silver contents which was declared equivalent to the colonial shilling in question. For the period after 1708 when Queen Anne's Proclamation had become law, the par of the "lawful" colonial silver money to sterling was as follows:[59] New England 155:100; New York 155:100; Pennsylvania 178:100; Maryland 133:100; Virginia 120:100; South Carolina 161:100, but the significance of the official rates was limited because of the fluctuating value of the various types of colonial paper money.[60] Law courts as a rule passed judgment in terms of local pounds, shillings and pence. Debts in the currency of another colony constituted foreign-currency debts, to be judicially converted into "lawful money" of the forum.[61] Sterling was legally domestic until the Revolution,[62] but since execution of a sterling judgment—a point of great interest to English creditors—could ordinarily result only in a collection of colonial "lawful money", the difficulties

58. *Maryland Laws* 1812, c. 135.

59. According to Nettels, *supra*, n. 1, at 248.

60. A contemporary annotator of *Winslow* v. *Bloom*, 1 Hayw. (N.C.) 217 (1795), points out that in 1783 when the contract at bar was made, the North Carolina currency was "imaginary," that its value was only ascertainable by comparison "with the coined money of other nations," and that the paper money emitted by the government in terms of North Carolina pounds had soon depreciated. *Deering* v. *Parker*, *supra*, n. 31, is also in point.

61. See *Smith* v. *Jamison*, Mayor's Court of New York City, Select Cases (Morris, ed., 1935) 499 (1738), [New Jersey money]; *Shelley* v. *Willet*, *ibid.*, 539 (1708), [Barbados money]; *Strode* v. *Head*, 2 Wash. (Va.) 149 (1795), [Pennsylvania money]; *Pollock* v. *Colglazure*, 2 Ky. 2 (1801) [Pennsylvania money]. On the other hand, in *Broom and Platt* v. *Jennings and Herron*, Kirby (Conn.) 392 (1788), damages claimed on a promissory note of 1775 were assessed in terms of New York pounds, a proceeding difficult to explain.

62. See *Purviance* v. *Neave et al.*, 4 Harr. & McHenry (Md.) at 199, 201, 202 (1798).

were similar to those in the case of a judgment in foreign currency.[63]

In commercial relations great difficulties of accounting resulted from these chaotic conditions.[64] To attain a better basis people employed the term "proclamation money" in commercial dealings, meaning 4 sh. 6d = 54 pence of standard weight for one dollar—the "just proportion" of Queen Anne's Proclamation.[65] Proclamation money, therefore, was a "unit of account," namely, a silver unit of account.[66] The dollar-pound ratio according to the Proclamation, was still employed in commercial relations until the seventies of the last century.[67]

63. Under an Act of Virginia of 1749 (Acts of 1748, c. 12, § 29, 5 Henning 526 at 540) judgments were permitted to be entered in sterling money, conversion into Virginia pounds to be made by the sheriff at a fixed rate of 125:100. The actual rate of exchange on London being higher, the procedure was amended under pressure of the Home Government, *4 Acts of the Privy Council of England, Colonial Series* 143–145 ("Report of the Board of Trade, Aug. 4, 1754,") in 1755 (Acts of 1755, c. 7, 6 Henning 478) to the effect that the conversion was to be made by the court through general order for all cases decided during the term. *Proudfit* v. *Murray*, 1 Call (Va.) 394 (1798); see also *Scott's Executor* v. *Call*, 1 Wash. (Va.) 115 (1792); *Skipwith* v. *Baird*, 2 Wash. (Va.) 165 (1795). Since this procedure could not take into account a depreciation of the currency between judgment and execution, it also caused displeasure to the English merchants. *Cf.* 4 *Acts of the Privy Council, supra*, n. 37, at 143, 641. *Miller* v. *Home, Adm.*, Mayors Court of New York (*supra*, n. 61), at 478 (1731–32), is an instance of a New York judgment in current money on a sterling debt.

64. J. Wright, *The American Negotiator* (London, 1765), is illustrative of the monetary imbroglio. The work consists of numerous tables listing ratios between the pound sterling, the dollar, and silver, on the basis of possible valuations which are developed in arithmetical progression. Use of the work must have required a very high degree of accounting technique.

65. The term "proclamation money" was sometimes applied to colonial money the value of which was fixed by proclamation of the respective governors. See annotation to *Cuming et al.* v. *Munro*, 5 Term Rep. 87, 101 Eng. Rep. 50 (K.B. 1792); Bullock, *supra*, n. 1, at 131.

66. The discussion of the subject by Davis, *supra*, n. 42, at Vol. I, Chap. 2, sheds little light on the subject.

Sometimes (for instance by J. Wright *supra*) the term "plantation money" is employed for "proclamation money."

67. *Supra*, p. 334.

Section 41

FROM THE REVOLUTIONARY TO THE CIVIL WAR

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I. The Era of the Continental Congress [1]

The Revolutionary War exacted from the young states the utmost concentration of efforts in the financial field also. Obviously, the financing of the war could not be left to the several states; the Continental Congress, despite its general lack of legal powers, had to secure the supply of the necessary funds by its own action. This was done from 1775 on by the emission of bills of credit, called "Continental Currency." They were phrased as follows:

> N. Continental Currency Dollars
> This bill entitles the bearer to receive.....Spanish milled dollars, or the value thereof in gold or silver, according to the Resolution(s) of the Congress held at Philadelphia.
> [There follows the date of the Resolution or Resolutions.]

Hence the new national monetary unit was—strangely—a Spanish coin, but the Spanish dollar we know had long been the foremost currency and a widely accepted unit of account in the colonies. No other choice was practically feasible. "Milled" pieces (as contrasted with handmade pieces) had a corrugated edge, aimed at protecting the coin against clipping and sweating; they were supposed to possess full weight or nearly so. The date of redemption, which the notes left to Congress, was never set. Since the Continental Congress had no power to make the notes legal tender the several States did so on Congressional request threatening the violator with punishment and with forfeiture of

1. See H. Phillips, *Historical Sketches of the Paper Currency* I (1865), II (1866); Holt, "Continental Currency," 5 *Sound Currency* 81, (1898) depicting various types of Continentals; W. F. de D. Knight, *History of the Currency of the Country* (2d ed., 1900); Treasury Dept., U. S. Register of the Treasury *Doc. no. 1943* p. 12; Bullock, *The Monetary History of of the United States* (1900) 60; Laughlin, *Money, Credit and Prices* II (1931) 147.

the debt.[2] Congress added a Resolution declaring any convicted repudiator of the notes "an enemy of his country" to be "precluded from all trade and intercourse with the inhabitants of these colonies",[3] a pronouncement of dubious legal significance. The notes were issued not only in denominations of $1 and multiples thereof, but also in fractions such as two-thirds, one-half, one-third and one-sixth. There were no coins of baser metal, much less of precious metal based on the new unit. The first national currency of this country was therefore composed entirely of paper money. It created a "parallel standard" inasmuch as each State also had a currency of its own, disconnected from the dollar.[4]

The precipitous depreciation of the Continentals which developed since 1777, has often been described.[5] In 1780 they had become practically worthless (hence the phrase "not worth a Continental"). Belatedly, in 1790, they were received by the government in subscription of stock at the rate of 100 for one dollar specie,[6] but at that time most had gone to waste. Earlier —generally toward the close of 1780—the States had enacted "scaling" laws for the readjustment of debts entered into during the circulation of the Continentals.[7] The scales were ordinarily graded from month to month on the basis of the current silver value of the Continentals. They served as a precedent for the French scaling laws of the post-assignats period, but they were imperfect enough, causing wide confusion and arbitrary settle-

2. See, e. g., Bullock 66. Cf. also *Juilliard* v. *Greenman*, 110 U.S. 421, 447 (1883). The forfeiture feature had colonial precedents. Nettels, *supra*, p. 553, n. 1, at 265. The threat of punishment was Nothing new either, *supra*, p. 53.

3. Resolution of July 11, 1776; text in Hepburn, A *History of Currency of the United States* (1915) 14.

On measures actually taken against the repudiators see Phillips, *supra*, n. 1. at I 78; II 219.

4. The States, too, emitted bills of credit during and after the war. *Edwards* v. *Kearzey*, 96 U.S. 595, 605, 24 L.Ed. 793 (1877). These bills were in terms of pounds and shillings. Regarding Rhode Island see *supra*, p. 561.

5. See, e. g., the writings cited in 1. They are not free of inaccuracies, however. Bullock's study is the most reliable.

6. Act of August 4, 1790 (1 Stat. 138). A plan conceived by Congress in 1780 to redeem the "loans made to the United States" at a rate of at least 2½ percent (text in Phillips, at II 210) does not appear to have materialized. Circulation and depreciation far below that rate continued. On the war loans of the United States see Dewey, *Financial History of the United States* (12 ed., 1934), 45.

7. This subject has been explored by Hargreeves, *Restoring Currency Standards* (1926) 1. Meritorious though the study is, its documentation is far too meager.

ments. However, legislatures and courts were practically agreed that payments made in Continentals remained valid at their face value (there was no "retroactive revaluation");[8] creditors who had repudiated the tender of Continentals lost the advantages offered by the scaling laws.[9] Foreign creditors were not affected inasmuch as they were practically all English and their rights were expressed in pounds sterling. Their difficulties arose mainly from moratoria, sequestration of debts held by "enemies" and other war measures. This matter was settled by the Peace Treaty of 1783 and later conventions.[10]

Not long after the downfall of the Continentals, financial conditions improved markedly through French loans[11] and subsidies and the effects of a more favorable military and political situation. Foreign gold and silver reappeared. The Articles of Confederation, 1777,[12] had given the "United States in Congress Assembled" the exclusive right "to regulate the alloy and value of coins struck on their own authority or by that of the respective States" but Congress made little use of this power. In 1785 Congress adopted a Resolution sponsoring a national monetary system on a decimal dollar basis[13] and in 1786 passed a Mint

8. See Anonymous, 1 Hayw. (2 N. C.) 183 (1795), referring to a "constant practice of the North Carolina Courts"; Hargreeves 18. However, a South Carolina statute enacted in 1780 under British administration permitted the impugnment of payments made in Continentals, a regulation influenced by the British view that the Continentals were unlawful. Hargreeves 7.

9. Hargreeves 12, 23.

10. The Peace Treaty provided (Art. IV): "It is agreed that Creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona-fide debts heretofore contracted." See *Dulany* v. *Wells*, 3 Harr. & McHenry (Md.) 20 (1792); *Hamilton* v. *Person's Adm'r*, 2 Hayw. (3 N.C.) 236 (1803). This arrangement, bearing upon individual private claims, did not operate satisfactorily owing to State enactments impairing the creditors' rights. *Edwards* v. *Kearzey*, *supra*, n. 4, at 606. A new arrangement was attained by the Jay Treaty of Nov. 19, 1794, 8 Stat. 116, Art. 8, according to which the claims of private creditors should be submitted to arbitration, the United States Government being subrogated to the individual debtors; the awards were to be rendered in "specie without deduction". The matter was finally settled by the Treaty of 1802, Art. I, 8 Stat. 196, by which the United States promised to pay to England £600,000 in three annual installments at Washington.

11. The text of an American draft for the payment of interest on a French loan is reproduced *supra*, p. 383, n. 28.

12. Art. IX par. 4. See Carnegie Endowment for International Peace, *The Declaration of Independence, The Articles of Confederation*, etc. (1917).

13. Journal of Congress,, July 6, 1785, reprinted in *International Monetary Conference* 1878, p. 448.

Ordinance to this effect.[14] Practically, the Ordinance resulted only in the mintage of a limited number of copper coins [15]—the first metal money of the United States. The States had not been deprived of the right of coinage by the "Articles of Confederation". As a matter of fact some States manufactured or allowed private individuals to manufacture copper coins; there was also an excessive influx of English copper coins, a fact which caused the Continental Congress to forbid their circulation.[16] The old pound units persisted, but so did the concurrent (Spanish) dollar unit. The copper coins of Massachusetts (1786) ran in terms of one cent and one-half cent, the first example of coins based on the decimal system.[17] In addition there was a certain amount of dollar notes issued by newly established private banks, especially by the Bank of North America at Philadelphia, founded in 1791.[18]

II. The Federal Constitution

After victory was won conditions were pressing irresistibly toward the early adoption of a full-fledged national monetary system, but the Federal Constitution is rather laconic and not too clear in this matter.

The principal provisions in point are Art. I, sec. 8(5) which gives the Congress power "to coin money, regulate the value thereof and of foreign coin" and sec. 10 (par. 1) which prohibits the States from coining money, and orders them not to "emit bills of credit" [19] or "to make anything but gold and silver coin a tender in payment of debts." Sec. 8 leans closely on the Articles of Confederation with the difference that the mention of alloy was omitted as redundant. The value-regulating provision is rooted in the colonial past. The new reference to foreign coins makes it particularly clear that under that provision Congress should be competent to determine the rates of the various coins *in terms of the basic unit.*[20] Nothing like regulation of purchas-

14. Journal of Congress, Oct. 16, 1786, reprinted in *International Monetary Conference* 1878, p. 452.

15. Carothers, *Fractional Money* (1930) 55.

16. Mint Ordinance of Oct. 16, 1786, *supra*, n. 14. There were also restrictions by the States. Carothers 44.

17. Carothers 43.

18. L. Lewis, Jr., *A History of the Bank of North America* (1882) [copies of its notes follow page 74]; Laughlin, *Money, Credit and Prices* II (1931) 244.

19. See *infra*, p. 580.

20. There is no reason to assume with E. S. Corwin, *The Constitution and What It Means Today* (1943) 54, that adoption of bimetallism was then envisaged by Congress.

ing power, that is, of the general price level, was envisaged. Not only would the members of the Constitutional Convention—and for that matter those of the Continental Congress—have been utterly unwilling to grant the Federal government such a formidable might, but the very idea of purchasing power was then practically unknown.[21]

The legal-tender provision of sec. 10 was more open to misunderstanding. Its main purpose and effect was to prevent the States from making copper coins legal tender[22]—again an echo from pre-constitutional times. The prohibition was also applicable to notes issued by State-chartered banks, though in the light of colonial experience this question did not bother the legislators a great deal. Rather was it puzzling that the States should preserve legislative power on legal tender at all. The explanation must perhaps be sought in the fact that payments on debts expressed in the State currencies were contemplated.

So slim and frail was the legal foundation upon which the powerful monetary system of the United States has been built. This evolution was made possible by the understanding, courageous and wise construction of the Constitution by the Supreme Court. It would be erroneous, however, to think that the court simply and plainly submitted to economic and political desirabilities or even necessities. The great monetary cases fully mirror the conflict of opinion and the clash of personalities, and not invariably was the progressive view victorious. In other words, grave combats took place in the court, forcing the administrative branch of the government to great efforts in order to con-

21. A helpful discussion of the question is found in Dawson, "The Gold Clause decisions," 33 Mich.L. Rev. 647, 668 (1935). Collier, "Gold contracts and gold currency regulations," 23 Corn. L.Q. 520, 528 (1938) asserts that regulation of purchasing power was meant, but offers no historical or other evidence. A similar view is taken by Eder, "The Gold Clause Cases in the light of history," 23 Geo. L.J. 744 (1935).

In the Gold Clause Cases the Court deliberately avoided reasoning on the basis of a broad value-regulating power of Congress. *Supra*, p. 285. In *Hart Coal Corporation* v. *Sparks*, 7 F.Supp. 16 (W.D.Ky., 1934), the General Counsel of the National Recovery Administration "tentatively" advanced the argument that the Federal Government might be empowered by the value-regulating clause to relate the value of money to the wages of labor. Said the Court (at 28): "I am satisfied that no reputable court would so construe the provision of the Constitution." In *Hancock* v. *Yaden*, 121 Ind. 366, 23 N.E. 253 (1889), the court erroneously subsumed the Truck Acts, *supra*, p. 150, under the value-regulating clause, but this was only done to justify the constitutionality of State Truck Acts, as an alleged aid to Federal monetary legislation.

22. Carothers 55.

vince the court. Powers considered everywhere as natural and incontestable attributes of government had to be wrested from an often reluctant judiciary. However, the resultant troubles and uncertainties are the price which a democratic nation has to pay for having a government by law. The monetary legal history of the United States illustrates most impressively this aspect of the American system.

III. Establishment of the National Monetary System

In pursuance of the policy announced by the Continental Congress, the United States Congress passed an organic law of the monetary system, by enacting the statute of April 2, 1792 [23] "Establishing a Mint and Regulating the Coins of the United States" —a title reflecting the gravity of the decision to incur the expense of setting up another agency of the Federal Government. The Act rests practically on Hamilton's famous report of 1791 *On the Subject of a Mint.*[24] The unit of the system was based on the "value of a Spanish milled dollar as the same is now current averaged at 371-4/16 grains of pure silver," [25] an acknowledgment of its Spanish parentage.[26] The original legal weight of the Spanish *piece of eight* amounted to 377 grains of pure silver,[27] but an examination by the Treasury of a great many Spanish dollars current in the United States resulted in the adoption of the lesser weight; the "backward linking" *(rekurrenter Anschluss)* was necessarily to be made on the basis of a real (rather than statutory) valuation of the former unit.[28] In accordance with the Resolution of 1785 and for the first time in history the monetary system was organized on a decimal system. There were to be

23. 1 Stat. 246.

24. 2 *Annals of Congress* (1789–1791) 2112.

25. Act of 1792, § 9.

26. In addition to statutory reminders of the dollar's pedigree [see n. 54, *infra*] there is the interesting development of the symbol $, which is an evolution of Ps meaning pesos. The two vertical lines are the doubling of a single line which was a sort of shorthand simplification of P. The wavy line is the s. The popular belief that $ abbreviates U. S. is psychologically interesting but was refuted, as were other explanations, in a brilliant essay in Cajori, *A History of Mathematical Notations* II (1929) 15. The sign $ (with one vertical line) is also in use for the Argentine peso. Another reminiscence of the Spanish system is the slang phrase "two bits" for a quarter, meaning two reales, the equivalent of a quarter. *Webster's Dictionary,* under "bit." Price quotations on a 12½ cent basis, including such sums as 6¼, 18¾, 25 cts., etc., persisted widely in this country during the first half of the nineteenth century. Carothers, 82, 97, 104.

27. 2 *Annals of Congress* 2135 (Hamilton's Report).

28. *Supra,* p. 138.

coined golden *eagles, half eagles* and *quarter eagles* with values of 10, 5, and 2½ dollars respectively; a silver *dollar* or *unit* and silver *half dollars, quarter dollars* and *dismes* and *half dismes.* Copper *cents* and by an Act of May 8, 1792,[29] half-cents were likewise provided for.

Bimetallism is another dominant feature of the law. It was adopted on Hamilton's advice "in order not to abridge the quantity of the circulating medium," [30] a suggestion quite natural after colonial experiences. Hence legal tender quality was imparted to both gold and silver coin, with the full-weight *caveat.*[31] Likewise, free and gratuitous coinage was provided for both gold and silver coin, ½ per cent deduction for loss of interest being allowed in case the government or the party should desire to have the bullion exchanged at once for coin rather than to wait for the coinage.[32] Since export and import of the two metals were unrestrained, the classical rules of bimetallism were satisfied. The ratio between gold and silver was determined, again at Hamilton's suggestion, as 15:1, sec. 11 of the Act providing: "That the proportional value of gold to silver in all coins which shall by law be current as money within the United States, shall be as fifteen to one, according to quantity in weight, of pure gold or pure silver;" and this ratio reappears in the definitions of weight given for each individual coin, 24-12/16 grains of fine gold having the same monetary value as 371-4/16 grains contained in the silver dollar. The standard of gold coin was fixed as 11 parts fine to 1 part alloy, the standard of silver somewhat lower; [33] as customary the alloy was not taken into account in determining the monetary value.

The fact that the silver dollar is referred to in the law as "dollar or unit" has sometimes led to the misapprehension that silver rather than gold was the true basis of the 1792 system and that the silver dollar was one dollar in a more sublime sense than the eagle was ten dollars.[34] In reality there was no more than a slight inaccuracy of expression; the actual rules adopted do not

29. 1 Stat. 283.

30. 2 *Annals of Congress* 2115. Cf. Murad, *The Paradox of a Metal Standard* (1939) 18, 36.

31. A weight less than full should reduce the legal tender effect proportionately. Act of 1792, § 16.

32. Act of 1792, § 14.

33. Namely, 1485 parts fine to 179 alloy, an extremely awkward ratio. For an explanation, see Carothers, *Fractional Money* (1930) 62.

34. See, e. g., Bakewell, *Past and Present Facts about Money in the United States* (1936) and the writer's review, 37 Col.L.Rev. 162 (1937).

admit of any doubt that silver and gold coins were fully coordinate at the ratio 1:15.[35]

In technical discussion it would be more appropriate to reserve the term "dollar" for the ideal unit rather than for the coin. This meaning of the word is found in the law itself. Sec. 20 of the Act [36] prescribes: "That the money of account of the United States shall be expressed in dollars or units, dismes or tenths, cents or hundredths, mills or thousandths, . . . and that all accounts in the public offices and all proceedings in the courts of the United States shall be kept and had in conformity to this regulation." This is the only section of the Act which is still in force; it is prohibitive, for example, of judgments by Federal courts in foreign currency. The denomination *unit* has never become popular.[37]

It is characteristic that as late as 1797 and 1834 Congressional orators voiced objection against the power of the Federal Government to make money legal tender,[38] but that power was rightly held to be included in its coinage prerogative just as it had been in the prerogative of the English Crown.[39] Those objections had no influence upon the course of events.

The Act of 1792 was supplemented by the Act of February 9, 1793,[40] which, in exercise of the power of Congress to regulate the value "of foreign coin," conferred definite dollar values upon the major foreign gold and silver coins which circulated in the country, making them legal tender at the ratios indicated in the law, as had previously been done by the legislation of the several colonies.[41] The Spanish milled dollar, full statutory weight presupposed, was, of course, equalized with the American dollar.

35. Said Hamilton, 2 *Annals of Congress* at 2135: "That the unit, in the coins of the United States, ought to correspond with 24 grains and ¾ of a grain of pure gold, and with 371 grains and ¼ of a grain of pure silver, each answering to a dollar in the money of account"; and on p. 2118: "The Secretary of the Treasury is, on the whole, strongly inclined to the opinion that a preference ought to be given to neither of the metals for the money unit. Perhaps, if either is to be preferred, it ought to be gold rather than silver."

36. 1 Stat. 250, 31 U.S.C. 371.

37. Hamilton's expectations had been to the contrary. 2 *Annals of Congress* 2137.

38. Breckenridge, *Legal Tender* (1903) 89, 94, n. 2.

39. *Supra*, p. 41.

40. 1 Stat. 300.

41. Congress, however, had already by the Act of July 31, 1789 [1 Stat. 29], established rates of foreign "coin and currency" for customs purposes. The time of operation of the legal tender provisions, narrowly limited by the 1793 Act, was extended by later enactments.

The monetary systems of the States were not entirely abolished by the Act of 1792. State laws rating foreign coins in terms of local currency remained in the statute books. Accounting in colonial money persisted locally for a number of years.[42] Transition into the dollar system was facilitated by the fact that the Federal dollar was equal to the Spanish which had been rated everywhere in terms of colonial shillings.

IV. Development of Metal Currency

Under the Act of 1792, half dismes were actually the first to be coined, namely, in October, 1792;[43] silver dollars followed in 1794, eagles in 1795.[44] However, gold coins including foreign ones gradually began to leave the country, the 1:15 ratio being made ineffective through a rising gold market. The newly coined American silver dollars, popular in the West Indies for their fresh and bright appearance, were likewise exported, so that President Jefferson in 1806 suspended the further coinage of silver dollars, a measure which remained in force for three decades.[45] Thus the coin stock of the country consisted mainly of

42. In New York an Act of Jan. 27, 1797, N.Y. Laws 1797, c. 9, "relative to the money of account in this state" as amended by an Act of March 21, 1801, N.Y. Laws 1801, c. 52, provided for the exclusive use of the dollar unit in judgments and in accounts of public officers; but no rule as to the conversion of pound contracts into dollar contracts seems to have been passed in New York. It is illustrative that in *Scott* v. *Hornsby*, 1 Call. (Va.) 41 (1797) a sterling debt was judicially converted into local pounds rather than dollars, although the Act of Dec. 28, 1792 [Acts of 1792 c. 149] had directed conversion of money amounts expressed in the "laws of the Commonwealth" into dollars. (This direction was made broader in the Act of Feb. 18, 1819, c. 192.) Massachusetts adopted the dollar as the "money of account" of the state as early as 1794. Mass. Laws 1794, c. 42. Vermont followed in 1797, Laws of Vt. 1797, c. 42; Maryland as late as 1812 by a law the title of which is remarkable ("An Act recognizing the coin of the United States, and the value of foreign coins as established by the Acts of the Congress of the United States." Md. Laws 1812, c. 135.) *Shirras* v. *Caig*, 7 Cranch (11 U.S.) 34, 3 L.Ed. 260 (1812), is concerned with a sterling mortgage of 1802 on Georgia land. In *Shelby* v. *Boyd*, 3 Yeates (Pa.) 321 (1801), the defendant's obligation was for £1000 "lawful money of North Carolina". The plaintiff refused to accept North Carolina paper money which was still circulating in North Carolina; he alleged that such money could not be legal tender under the Federal Constitution, Art. I, sec. 10. The judgment went to the plaintiff on other grounds.

Stipulating in terms of Spanish milled dollars also locally survived the legislation of 1792. See *Christ Church Hospital* v. *Fuechsel*, 54 Pa. 71, 73 (1867).

43. Hepburn, *supra*, n. 3, at 45.

44. W. G. Sumner, *A History of American Currency* (1874) 60.

45. Watson, *History of American Coinage* (1899) 74. Apparently minting of gold was also discontinued by Jefferson, Watson 75.

"exogenous" elements such as foreign coin, more or less worn. Only the minor coins were domestic, and even they were partly "exogenous" inasmuch as the copper cents issued under the authority of the Continental Congress were allowed to circulate for some time after the enactment of the law of April 2, 1792.[46] Finally, after long deliberation, a step was taken to improve these obnoxious conditions. An Act of June 28, 1834[47] reduced the gold content of the Eagle (and of the other gold coins, proportionably) from 247.5 to 232 grains, that is, approximately 6 per cent. The standard weight of the Eagle was fixed at 258 grains, the alloy being augmented from one-twelfth to approximately one-tenth. A statute of January 18, 1837[48] for technical reasons increased the gold content of the Eagle a little, up to 232.2 grains, by establishing within the unaltered standard weight of the Eagle the exact alloy proportion of 1:10. The same ratio was applied to the silver coin, the standard weight of the silver dollar being lowered from 416 to 412.5 grains, with no change in the pure silver content (371.25 grains).

By adopting a gold-silver ratio of 16:1,[49] the 1834 legislation not only did away with the under-rating of gold coins but enhanced their legal value about 3 per cent[50] above the market price of gold, which was approximately 15½ times the value of silver. The legislative measure therefore amounted to a devaluation of the dollar, and was cited in this sense by the Legal Tender Cases.[51] While the devaluation was very slight and practically imperceptible to the general public, a new legislative power had been assumed by Congress.

Coinage of silver dollars was resumed after the passage of the Act, but silver coins flowed out of the country.[52] Mainly, worn

46. Act of May 8, 1792, § 2, 1 Stat. 283.

47. 5 Stat. 196. There was some opposition in the House. *Breckenridge, Legal Tender* (1903) 91. Also, Daniel Webster believed that Congress had no power to demonetize coins. Dewey, *Financial History of the United States* (12th ed. 1934) 71. On the political background of the Act see O'Leary, "The Coinage Legislation of 1834," 45 Journ. Pol. Econ. 80 (1937). One factor was the belief that monetary predominance of silver favored the issue of banknotes, which was frowned upon at that time, particularly by President Jackson. That belief, caused by the greater difficulties of transporting silver, had already been referred to in Hamilton's report, *supra*, n. 24, at 2118. See also Murad, *supra*, n. 30, at 38.

48. 5 Stat. 136.

49. More exactly 15.988:1. Hepburn, *supra*, n. 3, at 60.

50. Hepburn, 61; Sumner, *supra*, 574, n. 44, at 109, states the value of the new gold dollar at 97.5 cents in terms of silver.

51. Though in an erroneous way, *infra*, p. 588, n. 44.

52. This development, however, was delayed by dishoarding of silver

foreign silver coins remained. Although the bimetallistic scheme of American legislation remained in force, it was now the gold which determined the value of the dollar. An improvement of the system was effected by a statute of February 21, 1853,[53] which reduced by about 7 per cent the silver contents of the smaller coin up to the half dollar, since the relative value of silver was then increasing because of the discovery of the gold fields in California. The reduction was sufficient to keep the coins in the country. Inasmuch as the legal tender quality of the new coins had been limited to sums not over five dollars, and silver dollars were not actually in circulation, the Act constituted another step towards a gold standard.

Since 1806 confused Congressional legislation[54] attempted to gradually rid the country of foreign coin. Under the existing and more favorable conditions, those attempts were more promising, but it was only by an Act of February 21, 1857,[55] that the Spanish dollar, last remnant of the intruders, was deprived of its legal tender feature.

Private coins were not prohibited by the Constitution. Originally the question presented no actual problem, but from 1830 on and especially since the "gold rush" considerable amounts of private gold coins were circulated in California and other western States.[56] This extraordinary indulgence in American individualism ended in 1864 when private coining was prohibited by law.[57]

coin and by other incidental factors. Dowrie, *Money and Banking* (1936) 38.

53. 10 Stat. 160. There was no "free coinage" of the debased coins. For detailed discussions of the Act, see Carothers, 122, and Murad, *supra*, n. 30, at 44.

54. These numerous Acts are collected in Huntington and Mawhinney, *Laws of the United States concerning Money, Banking and Loans* [Sen. Doc. No. 580, 61st Cong., 2d Sess. (1910)]. See also Carothers 78. There still exists in the present law of the United States a venerable residue of the old law: "The pieces commonly known as the quarter, eighth, and sixteenth of the Spanish pillar dollar, and of the Mexican dollar, shall be receivable at the Treasury of the United States, and its several offices, and at the several post offices and land offices, at the rates of valuation following: The fourth of a dollar, or a piece of two real, at 20 cents; the eighth of a dollar, or a piece of one real, at 10 cents; and the sixteenth of a dollar, or half real, at 5 cents." 11 Stat. 163 (1857), 31 U. S.C. 374. Looking only at the metal value of those Spanish and Mexican coins (a 25-cent piece is worth 16 to 17 cents in silver bullion) the exercise of the right flowing from the section quoted would still be profitable.

55. 11 Stat. 163, 31 U.S.C. 374. See Carothers 140, 145.

56. Adams, "Private gold coins," *American Journal of Numismatics*, 1911, pp. 21, 46, 129; 1912, pp. 1, 57, 135, 168; *Adams' Official Premium*

57. See page 577.

V. Development of Paper Currency

As in the preceding period, more momentous and dramatic events took place in the field of paper money. Now, the new developments centered on private bank notes rather than on government bills of credit. Regulation of private banking was, as the Supreme Court recognized,[58] a matter of State legislation, but the State authorities were frequently unfamiliar with the dangers inherent in the exercise or non-exercise of that power. This was particularly true with respect to the issuance of bank notes. Promoters and profiteers of the worst type had their heyday. Banks shot up like mushrooms. Bullock, the eminent historian of American finance, describes the abuses perpetrated by the State banks, i.e., by banks operating under State law, as follows: [59]

"The capital of many institutions was only partially paid in, and stockholders frequently proceeded to borrow back all that they had contributed. Loans were made upon mortgage security, while it seemed impossible for the disastrous results that commonly followed such a policy to teach the obvious lesson that an institution that attempts to support a large amount of demand liabilities must invest its funds only in quick assets. Notes were issued in such small denominations as one shilling,[60] or even five cents, in the expectation that it would never be worth anyone's while to collect such infinitesimal currency and present it for redemption. One notorious bank, which broke down in 1809, was found to have $580,000 of notes in circulation, and $86.46 in its specie reserve. Banks were located in inaccessible places, 'on

List of United States Private and Territorial Gold Coins (1909): *Catalogue of Coins, Tokens and Medals* (U. S. Mint, 1914) 20; White, *Money and Banking* (Rev. Ed., 1935) 34. "Moffat issue," a ten-dollar gold coin manufactured by Moffat in California, was particularly popular. In *Chapman et al.* v. Cole, 12 Gray (78 Mass.) 141 (1858), a Moffat coin was held not to be money in Massachusetts. The facts of the case are indeed evidence that the coins were not generally known and did not circulate in that section of the country. Under the societary doctrine of money there is no difficulty in the hypothesis of a money being recognized and valid, as such, only in a section of the state. In the eighteen-thirties private coins, mostly satirizing President Jackson ("hard-time tokens") made their appearance. Low, *Hard Time Tokens* (1899).

57. Act of June 8, 1864, 13 Stat. 120, 18 U.S.C. 487.

58. *Bank of Augusta* v. *Earle*, 13 Pet. (38 U.S.) 519, 10 L.Ed. 274 (1839).

59. *Essays on the Monetary History of the United States* (1900) 83. Quoted with the permission of the publisher, Macmillan, N. Y.

60. Regarding the persistent local use of the shilling unit see *supra*, n. 42.

some bottomless prairie road,' or in the depths of forests, where it would prove as difficult as possible to find the 'offices' at which the notes were payable. When a Boston bank sent a batch of currency to New York for redemption, the collector of the port seized the bills upon the pretext of preventing a run on the New York banks. A messenger sent to South Royalston to demand the payment of $10,000 in notes issued by the local bank, was arrested upon a frivolous charge in order to avoid such a request. Nothing was more common than a state of public opinion which condemned every attempt to obtain specie from the banks. To ask one of these institutions to fulfil the promise printed on the face of its bills was a disgraceful act, which indicated a lack of public spirit, or was proof positive of a desire to start a 'run.' In Ohio, Indiana, and Missouri, between 1855 and 1859, certain persons who presented notes for redemption were threatened with lynching or a coat of tar and feathers."

To some extent State legislatures opened the fight against these foul practices. New York was leading in the struggle. In 1829 it adopted the "Safety-Fund" system which required the banks of issue to obtain a charter and to contribute to a joint fund from which defaulting notes were to be redeemed.[61] Under the impression of the panic of 1837, this regulation was replaced in 1838 by legislation limiting note issues to the amount of eligible government bonds and mortgage bonds deposited with the State Comptroller.[62] Inasmuch as a charter was no longer required, the new device was called the "Free-Banking" system.

Congress, too, entered the field. In 1846, resuming an earlier attempt,[63] it established the "Independent Treasury System" or "Subtreasury System" which forbade the Federal government to deposit its money with banks or to use it for other banking transactions;[64] the government was to be rendered "independent" of banks. Practically all payments into and from the Treasury had to be made in specie so that the administration became entrusted with the management of tremendous stocks of coin; for this purpose "subtreasuries" were created in various commercial centers of the country. The whole plan was definitely backward.[65]

61. N. Y. Laws 1829, c. 94; Dewey, *supra*, n. 3, at 155; Hepburn, *supra*, n. 3, at 104.

62. N. Y. Laws 1838, c. 260; Hepburn 143.

63. Act of July 4, 1840, 5 Stat. 385, repealed by Act of Aug. 13, 1841, 5 Stat. 439.

64. Act of Aug. 6, 1846, 9 Stat. 59; see Kinley, *The Independent Treasury System* (1911); Dewey 252; Hepburn 155. Payment in U. S. Treasury notes, though permitted, was insignificant.

65. Thus in 1854 an Examiner reported to the Government that

Much more significant and eventful were the efforts of the Federal Government to take a direct hand in the issuance of bank notes, by chartering and promoting a Federal bank of issue to be administered according to progressive banking principles. The United States had entered upon this path before the organic monetary law had been passed. In 1791, on Hamilton's initiative, and on the basis of his proposals, an Act was adopted instituting the Bank of the United States.[66] The notes of the bank (minimum amount $5.), were to be receivable in all payments to the United States. In spite of a most successful conduct of business by the bank, its charter was allowed to expire in an anti-federalist atmosphere. A new Federal bank, the Bank of the United States of America, was authorized by Congress in 1816.[67] Its notes carried the same privilege as the notes of the first bank. Again the bank did not exist long. In 1836 it succumbed, mainly on political grounds, to the hostility of President Jackson. Nevertheless, the bank remains memorable in legal history. In order to drive State bank notes from circulation, and especially their less desirable types, the bank early embarked upon the policy of presenting such notes to the issuing banks for redemption in specie rather than to pay the notes out in the regular course of business. The States reacted violently. Since the Bank of the United States had a branch office in Baltimore, Maryland passed a law laying an unbearable tax upon the office, and numerous other States followed suit.[68] In *McCulloch* v. *Maryland,* decided in 1819, the Supreme Court invalidated the Maryland tax in one of the great opinions of Chief Justice Marshall.[69] On broad

"Western depositories were inadequately protected. He found, for example, the subtreasury at Jeffersonville, Indiana, in a tavern adjoining the bar-room, with which it was connected by a door with glass lights, so that the subtreasurer might, when in the bar-room, see into his office. The entrance for the public was through a back passage under a stairway. The office was divided into two rooms by a temporary partition, lighted by a single window defended by iron grates. The silver was kept in wooden boxes, the gold in an iron safe. The subtreasurer slept in one of the rooms with his weapons." Hepburn, *A History of Currency in the United States* (1915) 156. Quoted with the permission of the publisher, Macmillan, N. Y.

66. Act of Feb. 25, 1791, 1 Stat. 191; Dewey 98, 126; Hepburn 82.

67. Act of April 10, 1816, 3 Stat. 266; Caterall, *The Second Bank of the United States* (1903); Dewey 145, 197; Hepburn 93.

68. See Caterall 64. In Ohio the state tax officials were arrested by the Federal Government. *Osborn* v. *Bank of the United States,* 9 Wheat. (22 U.S.) 738, 6 L.Ed. 204 (1824).

69. 4 Wheat. (17 U.S.) 316, 4 L.Ed. 579 (1819). The *Osborn* case follows the same line.

constitutional grounds the court declared that the establishment of a Federal bank was "necessary and proper" (words of the Constitution) for carrying into execution the fiscal powers of the Federal government and was therefore within the purview of the Constitution. Because of its doctrine of "implied powers," the case is a landmark in American constitutional law, and is widely known on this account, but it is noteworthy also from the viewpoint of financial law. It created the basis for the later establishment of national banks and of Federal Reserve Banks.

Circulatory notes of the Federal Government itself appeared in 1815,[70] as an after-effect of the War of 1812. They consisted of non-interest-bearing "Treasury Notes" issued in relatively small amounts (from $3. upward) and receivable for dues to the Federal Government; but they were not made legal tender. Issuance of such notes was in line with colonial tradition.[71] Moreover the relatively small emission of these bills was soon refunded. Hence the question of their constitutionality was not raised.[72]

States were prohibited to issue bills of credit, but some attempted to circumvent the rule. In 1830 money notes of the State of Missouri, disguised as "loan certificates" were held unconstitutional by the Supreme Court.[73] However, in 1837 a highly reprehensible instance of evasion was approved of by the same tribunal in *Briscoe* v. *The Bank of the Commonwealth of Kentucky*.[74]

70. Act of Feb. 24, 1815, 3 Stat. 213; Dewey 135. We are not concerned with interest-bearing treasury notes, as they are not money, *supra*, p. 75. In the terminology of finance "treasury notes" or "treasury bills" are generally understood to anticipate Treasury revenues; ordinarily they form a part of the "floating debt." See, e. g., *Palgrave's Dictionary of Political Economy* (1926), "Treasury bills."

71. *Supra*, p. 560.

72. The question, however, appeared later in this period. In 1843, the Secretary of the Treasury, under an Act of Oct. 12, 1837, 5 Stat. 201, had issued notes of $50 bearing interest at .001 percent (sic), redeemable after one year, and purchasable in coin at par on presentation. These strikingly evasive notes were declared unconstitutional as "bills of credit" by the House of Representatives. 28th Congress, 1 Sess. (1843), H. R. Rep. No. 379 and *Congressional Globe* 454, 460, (1843). It is surprising that the occurrence was not referred to in the *Legal Tender cases*, *infra*, p. 588.

73. *Craig* v. *State of Missouri*, 4 Pet. (29 U.S.) 410, 7 L.Ed. 903 (1830). The Constitution was rightly held not to stand in the way of a State which participated with other "corporators" in the foundation of a corporate bank of issue. *The United States Bank* v. *The Planters' Bank of Georgia*, 9 Wheat. (22 U.S.) 904, 6 L.Ed. 33 (1824).

74. 11 Pet. (36 U.S.) 257, 9 L.Ed. 708, 928 (1837). See Warren, *The Supreme Court in United States History* II (rev. ed., 1935) 27; Bates, *The Story of the Supreme Court*

The case constitutes another conspicuous though less gratifying judicial incident in this country's monetary history. The bank, a thoroughly "rotten institution" [75] was wholly owned, financed and managed by the State of Kentucky on the basis of a Kentucky statute. Since under the Federal Constitution nothing but gold and silver could be made legal tender by a State, the statute provided that if a judgment creditor in the process of enforcement would not accept the notes in payment, further proceedings were to be delayed for two years. It was all a device "to wipe out debts" through self-fabricated paper money.[76] The court held the notes to be lawful because they were "emitted" not by the State, but by the bank which possessed a distinct juristic personality. In 1834, under Chief Justice Marshall, the Court had decided the other way.[77] Two justices, however, had been absent, and no majority of the entire Court having been secured the Chief Justice directed a re-argument. After his death, with five of the justices having been appointed by President Jackson, the new decision was quite in line with the President's anti-Federal Bank policy. Mr. Justice Story was aroused by indignation to deliver a monumental dissenting opinion which made the case an outstanding one in the history of the Supreme Court. Fortunately, the decision did not do too much harm. Some State-owned banks of issue were created later, and their notes were held constitutional under the *Briscoe* case,[78] but at least the attempt to force the notes upon private creditors was not repeated. Civil War legislation finally dealt the death-blow to State banks of issue.

(1936) 144; Sumner, *A History of Banking in the United States* (1896) 144; Dewey 261.

75. Summer 1. *c.*

76. Summer 1. *c.*

77. *Briscoe* v. *Commonwealth Bank*, 8 Pet. (33 U.S.) 118, 8 L.Ed. 887 (1834).

78. *Woodruff* v. *Trapnall*, 51 U.S. (10 How.) 190, 13 L.Ed. 383 (1850) [Bank of the State of Arkansas]; *Darrington* v. *Bank of Alabama*, 54 U.S. (13 How.) 12, 14 L.Ed. 30 (1851).

Section 42

CIVIL WAR AND GREENBACKS

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I. National Bank Notes and Greenbacks

It was the hardest way—through the bitter experience of the Civil War—that the country attained a wholly national monetary system. The War started on April 12, 1861, with the firing on Fort Sumter. In December of the same year State banks throughout the country suspended "specie payment" i. e., redemption of their notes. This brought about a situation favorable to reintroduction of national banks of issue. Since the establishment of one great Federal institution was inadvisable politically as the fate of the two Banks of the United States had shown, the National Bank Act of 1863,[1] re-enacted in 1864,[2] provided for the institution of private "National Bank Associations" [3] somewhat along the lines of the New York "Free Banking" system. Any group of no less than five persons was permitted, under certain conditions, to deposit with the Treasury, United States bonds eligible for that purpose—but not mortgage bonds as in New York—and to emit bank notes under strict supervision by the Government. The notes were not to exceed 90% of the market value nor 90% of the face value of the bonds. They were made receivable for all public dues except customs,[4] interest on the public debt of the United States and redemption of national currency—exemptions calculated to strengthen the credit of the government. Provision was made for the smooth conversion of State banks—that is, State-chartered banks—into national banks. As this opportunity did not prove attractive enough for the State banks, a drastic measure was taken in 1865 and 1866 by imposing a "death tax" of 10% upon the use of State

1. Act of Feb. 25, 1863, 12 Stat. 665.
2. Act of June 3, 1864, 13 Stat. 99.
3. The term "Association" should probably indicate abstention from corporation law, a matter for State legislation. Actually, the national banks were and are corporations.
4. Clearing house certificates of the national banks were likewise given money-like functions though only for certain narrow purposes. National Bank Acts of 1863, 12 Stat. 665, § 41, and of 1864, 13 Stat. 99, § 31. Such certificates appeared again as circulating media in later crises, *infra*, p. 597, n. 17.

bank notes in payments.[5] Transformation of State banks into national banks was now greatly accelerated and State bank notes disappeared entirely from circulation. In *Veazie Bank* v. *Fenno*,[6] the constitutionality of the "death tax" was affirmed by the Supreme Court. The opinion written by Chief Justice Chase, emphatically proclaimed the "power of Congress to secure a sound and uniform currency for the country," and to this end "to restrain by suitable enactments, the circulation as money of any notes not issued under its own authority." Thus exclusive Federal power over the currency was acknowledged. This was indeed a legitimate adaptation to the needs of a growing and struggling country.

As a curiosity it may be mentioned that in 1862 and 1863 postage stamps were given public receivability [7] but the experiment of this national "postage currency" failed grievously.[8]

The central monetary problem of the period was that of the "greenbacks." In order to finance the war, Congress from 1862–1864 passed several laws authorizing, for the purpose of monetary circulation, United States Notes.[9] Other than the Treasury Notes of 1815, the new notes ("greenbacks") were made "lawful money and legal tender," again with an exception for customs and payments on the public debt. The first issues were convertible after five years, at the holder's option, into 6% gold bonds maturing in twenty years, the interest being payable in coin. This arrangement provided for an indirect redemption of the notes and seemed to justify the legal tender rule from an orthodox point of view, but the right to receive gold bonds for greenbacks was repealed in 1863, under the pressure of emergency.[10] Depreciation of the greenbacks which at the end of the

5. *Supra*, p. 90, n. 61.

6. 8 Wall. (75 U.S.) 533, 19 L.Ed. 482 (1869).

7. Acts of July 17, 1862, § 1, 12 Stat. 592, and of March 3, 1863, § 4, 12 Stat. 709, 711. See Mitchell, *A History of the Greenbacks* (1903) 98, 99, 161, 180, and Carothers, *Fractional Money* (1930) 171.

8. See Falkner, "The private issue of token coins," 16 Pol. Sci. Qu. 321 (1901). "The adhesive stamps of the postoffice were an awkward makeshift as currency. They cracked easily, and when they grew dirty could not be used for their original purposes. Frequently the mucilage was washed off, or they were pasted upon strips of cardboard. In some cases they were encased in metal, and I have seen one with the face protected by a piece of mica and bearing on the metal back an ingenious advertisement."

9. Acts of Feb. 25, 1862, § 1, 12 Stat. 345; March 17, 1862, § 2, 12 Stat. 370; July 11, 1862, § 1, 12 Stat. 532; Jan. 17, 1863, 12 Stat. 822 at 823; March 3, 1863, § 3, 12 Stat. 709 at 710 and June 30, 1864, § 2, 13 Stat. 218.

10. Act of March 3, 1863, 12 Stat. 709, § 3, last sentence.

war totalled 450 million dollars, had started earlier, but was now accelerated. As speculation in gold and foreign exchange intensified, an Act of June 17, 1864[11] prohibited transactions in gold or gold coin from being completed subsequent to the day of contracting, and transactions in foreign exchange from being completed later than within ten days. Futures in gold and in foreign exchange were thus enjoined—a historically interesting early example of attempted exchange restrictions. We say "attempted" because the Act only led to disorganization of the gold market and was repealed after three weeks.[12] The idea of fully regulating the gold market or requisitioning the gold holdings was then inconceivable and impossible of execution under the circumstances. In fact, the requirement of gold payment for customs and the public debt to which the courts added other exceptions,[13] gave legitimacy to the gold market. Speculation in gold remained unfettered, and the greenbacks reached their nadir in July, 1864, when they dropped to less than 40% of their gold value.[14] Victory quickly and definitely reversed the trend and soon from many quarters projects for quick resumption of specie payment were advanced. In Congress, however, the majority were inflationist.[15] Despite the general upward trend of the curve, uncertainties persisted. The dollar-gold quotations kindled the gambling spirit of the nation to such an extent that people from all walks of life joined the gold speculators.[16] In New York, in addition to the Stock Exchange, no fewer than three gold markets sprang up.[17] Speculation reached its climax on September 24, 1869, "Black Friday," when the price of gold, cornered by Mr. Gould and Mr. Fisk, was jerked upward from 143 to 160, only to plunge, within 15 minutes, to 133, owing to intervening selling orders of the government.[18] Recollection of the event has long contributed to animosity against New York finance.

11. 13 Stat. 132.

12. Act of July 2, 1864, 13 Stat. 344. The story of the two enactments is told by Mitchell, *supra*, n. 7, at 228.

13. *Infra*, p. 592.

14. The economics of the greenback period have been thoroughly investigated by Mitchell, *A History of the Greenbacks* (1903), a meticulous work covering the years 1862 to 1866; *id.*, *Gold, Wages and Prices under the Greenback Standard* (1908); and by Barrett, *The Greenbacks and Resumption of Specie Payments 1862–1879* (1931).

15. For a survey of the controversy, see Dewey, *Financial History of the United States* (12th ed., 1934) 335, 338.

16. Mitchell, *History* 185.

17. Mitchell, *History* 182.

18. The exciting story of the corner and its failure is told by Barrett, *supra*, n. 14, at 84. See also Henry Adams' Report in Van Doren, *An Autobiography of America* (1929) 621.

After much maneuvering an Act of January 14, 1875 (Resumption Act) was passed, ordering resumption of specie payment for greenbacks on January 1, 1879.[19] The Act gave rise to the strange phenomenon of the "Greenback Party" which demanded repeal of the Resumption Act and further expansion of greenback issues.[20] At its climax, in the Congressional elections of 1878, the Party polled more than a million votes, but it soon collapsed. Since 1876, the premium on gold dwindled quickly and disappeared two weeks before the Act became law. Thus the heavy and detrimental dualism of the monetary system was finally overcome without expensive and hazardous action which an earlier resumption of specie payment would have required. Dangerous and demagogic though many of their demands were, the majority of Congress had shown sounder judgment than their learned and financially expert opponents. The economic expansion of the nation after victory had absorbed the inflationary infusion and remedied the situation.

A memorable condition developed in California and Oregon during the greenback period.[21] Having easy access to gold coinable in the San Francisco mint, and being geographically separated from the rest of the Union, the people of those states succeeded in keeping the greenbacks at arm's length. The business community organized a resistance movement; the Portland merchants association went so far as to threaten the black-listing of debtors who should dare to insist on tendering greenbacks.[22] State legislation and courts supported the movement. Gold clauses were declared valid,[23] and eagerly read into contracts;[24] gold payment was required for State taxes,[25] and rendition of judgments in terms of gold coins was facilitated.[26] As will be

19. 18 Stat. 296, § 3.

20. Cf. Dewey, *supra*, n. 15, at 378.

21. See Lester, *Monetary Experiments* (1939) 161; Moses, "Legal tender notes in California," 7 Qu. Journ. Econ. 1 (1892).

22. Lester 165.

23. *Carpentier* v. *Atherton*, 25 Cal. 564 (1864); California "Specific Contract Act" of April 27, 1863; (see Moses, *supra*, n. 21, at 24.) A similar law was adopted by Oregon in October, 1864, *Lester* 166.

24. See, e. g., *Spencer* v. *Prindle*, 28 Cal. 276 (1865).

25. Oregon law of October, 1864, Lester 166. In July, 1862, the Supreme Court of California had declared that the Legal Tender Acts did not apply to State taxes. *Perry* v. *Washburn*, 20 Cal. 318. See also *infra*, p. 592.

26. California in 1863 by the Specific Contract Act (*supra*, n. 23) allowed judgments in terms of gold coins, as a form of specific performance. Breckenridge, *Legal Tender* (1903) 158; Hunt, *A Treatise on the Law of Tender* (1903) 119; Moses, *supra*, n. 21, at 20. Such judgments seem to have become a matter of routine so that they would be ordered by

seen, those measures were later held lawful by Federal authorities who were probably afraid of alienating another section of the country, but when enacted they were of dubious validity and their lack of patriotism was evident. Dissents were voiced and the Treasurer of the State of California protested in violent language,[27] but in vain. California and Oregon retained their gold standard and courts of other states could not help recognizing this fact.[28] Certainly the California and Oregon developments should be counted among the strangest of the many unique features of American monetary history.[29]

In the other states adhering to the Union the greenbacks circulated freely. The "dual" or "parallel" standard of coins and paper persisted for more than sixteen years. It placed difficult problems before legislators and courts.[30] The most formidable among them bore upon the constitutionality of the "Legal Tender Acts."

II. The Legal Tender Cases [31]

While the Constitution prevents States from emitting "bills of credit," it is silent on Federal bills of credit. The Constitutional Convention had deliberately struck from the draft of the Constitution a provision empowering the Federal Government to emit such bills.[32] No express interdiction of the bills was enacted, however. Thus the question remained open, despite the unfavorable attitude of the Convention. Moreover, the circulatory Treasury notes of 1815 had never been objected to. True, they had not been legal tender, but this fact was not essential to "bills of credit;" colonies had often emitted such bills without making

the court without the plaintiff's demand. Cf. *Belford* v. *Woodward*, 158 Ill. 122, 41 N.E. 1097 (1895), and California cases cited therein.

27. Moses 6.

28. Legal Tender Cases, 12 Wall. (79 U.S.) 457, 678, 20 L.Ed. 287 (1870); *Simpkins* v. *Low*, 54 N.Y. 179, 181 (1873) [conversion of California plain dollar bonds; valued on a gold dollar basis].

29. Lester 168 points out that only "the people on the Pacific Coast" could decide whether "they should have pulled in their belts" and that their decision to remain on gold "did help them to keep up their standard of living." A strange view.

30. See for instance on the question of damages *supra*, p. 183, n. 54.

31. Dawson and Cooper, "The effect of inflation on private contracts: United States 1861–1879, The Inflation in the North 1862–1879," 33 Mich.L.Rev. 852 (1935).

32. For an extensive inquiry into the debates in the Constitutional Convention see Breckinridge, *Legal Tender* (1903) 74. Mr. Justice Bradley, in *Knox* v. *Lee*, 12 Wall. (79 U.S.) 457, 559, 20 L.Ed. 287, referred to the "diverse views of members [of the Convention.]"

them legal tender.[33] The essential thing was the circulatory feature. Evidently it would have been absurd to deny a belligerent government each and every power to issue circulatory notes; hence the objection based on the bills-of-credit rule clearly overshot the mark. The question of the constitutionality of the Legal Tender Acts had to be decided on broader grounds. Even so, the answer was doubtful. The issue was first laid before State courts. Among seventeen jurisdictions seized with it, sixteen held the Legal Tender Acts constitutional.[34]

A similar majority stressed this view to the extent of invalidating gold clauses in contracts as violative of the Acts.[35] Therefore, when in 1867 the case of *Hepburn* v. *Griswold,* challenging the constitutionality of the greenbacks, reached the Supreme Court, there was a general sentiment that the Court, part of the federal government, would feel, even more strongly than the State courts, the obligation to uphold the basic measure which had been used in financing the war. Moreover, once the greenbacks were issued, and had with the approval of State courts created and discharged numberless pecuniary relations, invalidation of the Legal Tender Acts was bound to "cause throughout the country great business derangement, widespread distress, and the rankest injustice"; it would even "take hold of the possible continued existence of the government".[36] However, after more than two years of deliberation, on February 7, 1870, the court on a four to three vote announced that the greenbacks were not good tender as to prior contracts, because otherwise the obligation of contracts would be impaired contrary to the Due-Process clause of the Fifth Amendment.[37] The holding amounted practically to an invalidation of the whole of the Acts, and this was also suggested by the language of the opinion. Thus the highest federal tribunal took a strong anti-national attitude in striking contrast to the strong pro-national attitude of the State courts. The opinion was written in emphatic terms by Chief Justice Chase who as Secretary of the Treasury had himself sponsored and certified as

33. Mr. Justice Story, dissenting, in *Briscoe* v. *Bank of Commonwealth of Kentucky,* 11 Pet. (36 U.S.) 257, 336, 9 L.Ed. 709, 928 (1837); Bullock, *supra,* p. 553, n. 1, at 37.

34. Only the Kentucky Court of Appeals, by a divided opinion, dissented. *Griswold* v. *Hepburn,* 2 Duv. (63 Ky.) 20 (1865). The cases are collected in Dawson and Cooper, *supra,* p. 31 at 858, n. 169.

35. For references see *supra,* p. 274, n. 62.

36. Language of Mr. Justice Strong in *Knox* v. *Lee,* 12 Wall. (79 U.S.) 457 at 529, 20 L.Ed. 287 (1871).

37. *Hepburn* v. *Griswold,* 8 Wall. (75 U.S.) 603, 19 L.Ed. 513 (1869). The case was decided in conference on Nov. 27, 1869. Mr. Justice Grier (see *infra,* n. 49) resigned shortly before the opinion was read.

constitutional the Legal Tender Acts.[38] But during the same day, and while the opinion was being read, President Grant sent to the Senate the names of two new Justices, Strong and Bradley.[39] On March 25, 1870,[40] four days after their confirmation, the Attorney General asked for reconsideration of the Legal Tender Acts in some other cases. On April 11, a new majority of the Court, consisting of the former minority together with Justices Strong and Bradley, contradicted the thesis of the former majority that the cases were disposed of by *Hepburn* v. *Griswold.*[41] While the other cases were soon withdrawn by the respective plaintiffs, the country was now confident that *Hepburn* v. *Griswold* would be reversed.[42] Hence the effects of the decision on the financial situation were only slight,[43] and havoc was averted. Indeed the constitutionality of the Acts was recognized through the new majority, by a five to four vote, in the Legal Tender Cases, *Knox* v. *Lee,* and *Parker* v. *Davis,* decided on May 1, 1871, on the ground that means of self-preservation could not be withheld from a sovereign power such as the United States.[44] The

38. Mitchell, *History,* 62, 92, 114.

39. Warren, *The Supreme Court in United States History* (Rev.Ed., 1935) II 516. By an Act of April 10, 1869, 16 Stat. 44, the original number of nine members of the Supreme Court had been restored.

40. Warren, II 519.

41. Warren, II, 525; Bates, *The Story of the Supreme Court* (1936) 184.

42. Hepburn, *A History of Currency in the United States* (1915) 258; Breckinridge 131.

43. Hart, *Salmon Portland Chase* (1899) 398. Fairman, "Mr. Justice Bradley's appointment to the Supreme Court and the Legal Tender Cases," 54 Harv.L.Rev. 977, 1128 at 1148 (1941).

44. 12 Wall. (79 U.S.) 457, 20 L.Ed. 287 (1871). The opinion was written by Mr. Justice Strong. He made a bad mistake in describing the legal effects of devaluation. On page 552 referring to the Act of 1834, *supra,* p. 575, he points out that "the creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the Act took effect), was entitled to *a thousand dollars of coined gold* of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent. less in weight and in market value, or *to a smaller number of silver dollars*" [Italics the writer's]. In reality, the creditor was never entitled to gold, the choice of the medium of payment being in the debtor. And of course the number of silver dollars to be employed in payments of a given sum was not made smaller by the law of 1834. Moreover, at the end of his opinion, Mr. Justice Strong fell into confusion when refuting the defense that money must possess "intrinsic" value. He denied in this connection that the Legal Tender Acts had made money with no intrinsic value—which they undoubtedly had done. Still, he had previously proved that Congress had power to do so. His errors do not affect the essence of his otherwise forceful opinion.

Some analyses of the case are found in Breckinridge, *Legal Tender*

Due-Process clause was not violated because each and every pecuniary obligation necessarily depends on the sovereign's power to define the monetary unit (this is what the Supreme Court later called the "congenital infirmity" of such obligations).[45]

However, the Court's line of reasoning seemed dependent on the necessities of warfare. Thirteen years later, in *Juilliard* v. *Greenman*,[46] the court held constitutional the reissue, authorized by Congress and carried out by the Treasury in peace time, of redeemed greenbacks. The power of Congress to emit legal tender notes was thus established by the Court as a self-evident attribute of sovereignty, and as a result of the tax, borrowing, and other express powers granted by the Constitution. "Its [*the Congress'*] power to define the quality and force of these notes [*the circulating notes issued for the money borrowed*] as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under these two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the National Government or private individuals." [47] This was an implementation of *Veazie Bank* v. *Fenno*. Currency powers not inferior to the power of any other government were secured to the United States. The gap in the Constitution was closed.

Apart from their juridical and financial importance, the *Legal Tender Cases* are among the most momentous incidents in the history of the Supreme Court. Within fifteen months, the Court had reversed its attitude with regard to a question vital to the nation,[48] one judge, Mr. Justice Grier, having shifted during the deliberations of *Hepburn* v. *Griswold* from the constitutionality group to the opposition.[49] The uncommonly protracted duration of this case, which, despite the urgency of the matter, had been pending for more than two years in the Supreme Court, was another striking fact. Grave animosity between the two groups within the court appeared in the conference on the rehearing of the constitutional question, and later crystallized in mutual ac-

(1903) 132 and Thayer, *Legal Essays* (1908) 60.

45. *Supra*, p. 139.

46. 110 U.S. 421, 4 S.Ct. 122, 28 L. Ed. 204 (1884).

47. *Loc. cit.* at 448 (1884).

48. Many debtors relying on *Hepburn* v. *Griswold* had paid their creditors in gold. Despite *Knox* v. *Lee*, they did not succeed in recovering the premium. *Troy* v. *Bland*, 58 Ala. 197 (1877); *Flower* v. *Lance*, 59 N.Y. 603 (1875). See also *Harris* v. *Jex*, 55 N.Y. 421 (1874); *Doll* v. *Earle*, 59 N.Y. 638 (1874).

49. Breckinridge 167, 168. He was a mentally broken man at that time.

cusation placed upon the record.[50] Particularly puzzling had been the course followed by the Chief Justice. An initiator and supporter of the Acts, he became an acrimonious antagonist condemning his own statecraft. In fact he pushed the fight between the contesting groups of the court to its extreme.[51] In *Hepburn* v. *Griswold* he tried to justify his change of mind by declaring that during the war the time was not favorable to a considered reflection upon the constitutional limits of the legislative authority,[52] but this apology amounted only to an acknowledgment of the fact that the emission of the greenbacks was imposed on the Government as a matter of self-defense under the exigencies of the war—a point of decisive legal significance. The most likely explanation is that Chase was aroused by Congress which again and again had postponed redemption of the greenbacks and frustrated thereby his wartime intentions.[53] Contrary to facts he even tried to convey the impression that he was not responsible for the cancellation of the indirect redemption which Congress had originally granted to the noteholders.[54] Legally, the question of his political responsibility was entirely irrelevant. In no event were his reasons and motives such as to offer an excuse for his aggressive and reprehensible conduct in this affair.[55] A question of personality, and not a pleasing one, was involved.[56]

50. Cf. Breckinridge 160 (particularly the *Statement of Facts* signed by Justices Swayne, Miller, Davis, Strong, and Bradley, at p. 161).

51. See the confidential letter of Miller, J., published by Fairman, "Justice Samuel L. Miller," 50 Pol. Sci. Qu. 15, 26 (1935).

52. 8 Wall. (75 U.S.) 603, 625, 19 L. Ed. 531 (1869).

53. Hepburn, *supra*, n. 42, at 207. See also next note.

54. In *Veazie* v. *Fenno*, *supra*, n. 6, at 537, Chief Justice Chase said that the greenbacks, "until after the close of the war were always convertible into, and receivable at par for bonds payable in coin, and bearing coin interest." This reads as though the greenbacks had until then been redeemable, at least indirectly. However, convertibility of the greenbacks had been abolished by the Act of March 3, 1863, *supra*, n. 10, which had been suggested by Chase himself as Secretary of the Treasury. Mitchell, *History of the Greenbacks* (1903) 115. Hence, Chase tried, contrary to the facts, to create the impression that he was not responsible for the abolition of convertibility—a most revealing attitude. It remains puzzling that his misstatement was not prevented by his brethren on the bench and has not been noticed by later writers.

55. In addition to the misstatement shown in n. 54, Mr. Justice Chase had to withdraw an unfounded accusation levelled against the majority in connection with the reopening of the Legal Tender question after *Hepburn* v. *Griswold*. Also, he tried first to prevent the re-argument by finding himself "indisposed" to attend. Fairman, *supra*, n. 43, at 980. Lack of poise appears in his dissenting opinion in *The Vaughan and Telegraph*, 14 Wall. (81 U.S.) 258, 20 L.Ed. 807 (1872) where he inveighed hopelessly against the Legal Tender Cases.

56. Cf. also Fairman 1147.

The Chief Executive, President Grant, himself, became implicated in the controversy. He was charged with having "packed" the Court by the appointment of Justices Strong and Bradley.[57] At the time of the appointment it was a matter of public record that both of them were in favor of the Legal Tender Acts.[58] Undoubtedly President Grant in making the appointments was justified to take into account the views of the appointees.[59] Their qualifications and the correctness of the appointment procedure have never been questioned.[60]

It is understandable why *Knox* v. *Lee* should have met with violent criticism.[61] It is, however, astounding that not even the nearly unanimous decision in *Juilliard* v. *Greenman* settled the question definitively. And while the course of events has fully demonstrated the clear inevitability of *Knox* v. *Lee*, still, as late as 1935 a writer could advance the opinion that the Legal Tender Cases are irreconcilable with the Constitution.[62] It is the traditional hard-money sentiment, irritated by persistent inflationary movements, which is behind such a criticism, just as it is behind the disapproval of the Gold Clause Cases.

57. Hoar, *The Charge against President Grant* (1896); A. B. Hart, *Salmon Portland Chase* (1899) 399; Warren, *supra*, n. 39, at II, 517, Cormack, "The Legal Tender Cases —A drama of American legal and financial history," 16 Va.L.Rev. 132 (1929); Smith, "Neglected evidence on an old controversy," 34 Am.Hist. Rev. 532 (1929); Sachs, "Stare decisis and the Legal Tender Cases," 20 Va.L.Rev. 856 (1934); Ratner, "Was the Supreme Court packed by President Grant?" 50 Pol. Sci. Qu. 343 (1935); Fairman, *supra*, and numerous historical and biographical references given by the two last writers.

58. Mr. Justice Strong had voted for the constitutionality of the Acts when a member of a Pennsylvania court, Breckinridge 130. Regarding Mr. Justice Bradley see Fairman 989.

59. President Lincoln had done the same in the case of Chief Justice Chase, though with less success. Bates, *supra*, n. 41, at 172.

60. In the case of Mr. Justice Bradley this has been placed beyond any doubt by the meticulous account presented by Fairman.

61. See G. Bancroft, *A Plea for the Constitution of the United States of America Wounded in the House of Its Guardians* (1886). Cf. also Laughlin, *Principles of Money* (2d ed., 1919) 490. Of course, *Hepburn* v. *Griswold*, too, had evoked strong objections. Kemmerer, *Money* (1935) 264, alleging some instances, speaks of a "storm of protest."

62. Jerome, *Governments and Money* (1935) 175, 177. Very remarkable are the contrasting views of two important historians of the Supreme Court. While Warren, *supra*, n. 39, II 499, calls the Legal Tender Acts a "legalized cheating," Bates, *supra*, n. 41, at 185, feels that the decisions upholding the Act "gave Congress a highly necessary power over the currency and benefited the mass of American citizens." See also Zelkowich "An historical critique of the Gold

Still the hard-money theory was not entirely defeated by *Knox* v. *Lee*. We mentioned that the Legal Tender Acts themselves had exempted from their effect customs and interest on the public debt. In addition, provisos in private contracts, calling for payment in gold or specie, were upheld by the Supreme Court,[63] contrary to the general line taken by the State courts.[64] Also, gold-dollar debts were given the privileged position of debts of "sums certain." [65] Even the California-Oregon doctrine excluding taxes from the range of the Acts met with the approval of the Supreme Court.[66] Hence the outcome of the controversy was somewhat in the nature of a compromise on the basis of the "dual-currency" system.

III. Confederate Currency

Another line of crucial problems confronted the courts and legislators owing to the entire collapse of the Confederate "dollar" currency. In the theory of the United States courts that currency was created by "rebels" and had no claim to recognition. The question arose whether contracts made in terms of Confederate money were invalid on this ground. The Supreme Court of the United States in the case of *Thorington* v. *Smith* [67] answered the question in the negative. In language impressive for its calm and detachment the Court pointed out that contracts stipulating payment in Confederate currency could not, merely for that reason, be regarded as made in aid of the insurrection: "they are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame . . ." [68] The Court went on to show that the contract at bar, though calling for the payment of dollars without qualifying words, was to be interpreted as meaning Confederate dollars. Since the latter had depreciated to zero, validity of the contract would not have

Clause decisions," 29 Ill.L.Rev. 1058, at 1072 (1935) and Eder, "The Gold Clause cases in the light of history," 23 Geo. L. J. 722, 752 (1935).

63. *Bronson* v. *Rodes*, 7 Wall. (74 U. S.) 229, 19 L.Ed. 141 (1868); *Butler* v. *Horwitz*, 7 Wall. (74 U.S.) 258, 19 L.Ed. 149 (1868); *Trebilcock* v. *Wilson*, 12 Wall. (79 U.S.) 687, 20 L. Ed. 460 (1871); cf. *Gregory* v. *Morris*, 96 U.S. 619, 24 L.Ed. 740 (1877).

64. *Supra*, n. 34.

65. *Supra*, p. 252.

66. *Lane County* v. *State of Oregon*, 7 Wall. (74 U.S.) 71, 19 L.Ed. 101 (1868).

67. 8 Wall. (75 U.S.) 1, 19 L.Ed. 361 (1869). Cf. also Dawson and Cooper, "The effect of inflation on private contracts: United States, 1861–1879. The Confederate inflation," 33 Mich.L.Rev. 706 (1935), a comprehensive and careful study.

68. *Loc. cit.*, at 12.

helped the creditor had not the Court furthermore held that he was entitled to recover in U. S. dollars the actual value at the time and place of the contract, of the Confederate dollars contracted for. *Bissell* v. *Heyward* [69] elaborated this ruling by declaring that the value of the Confederate money should be calculated in terms of the (then depreciated) U. S. dollars rather than on a gold or sterling exchange basis which would have further diminished the amount of the debt. Since it would have been entirely justifiable to consider the Confederate money, and therefore the debts, as extinguished by the breakdown of the Confederacy, the decisions of the Court amount to revaluation. However, payments made in Confederate money were considered as a definitive discharge of debts [70] so revaluation was not made retroactive. Moreover, in *Thomas* v. *City of Richmond* [71] circulatory notes of one and two Confederate dollars emitted by the City of Richmond, were held invalid on the ground that the emission was ultra vires, and in pursuit of revolutionary purposes. The case fits very well into a revaluation doctrine since paper money is unfit for revaluation.[72]

In addition to judicial revaluation, which constituted a wholesome and statesmanlike contribution of the Supreme Court to the economic reconstruction of the South, legislative revaluation was ordered through scaling laws of former Confederate States.[73] These laws were enacted under heavy pressure by bewildered and incompetent legislatures,[74] and they had to remain within the bounds of Art. I, sec. 10 of the Federal Constitution, enjoining the States from impairing the obligation of contracts. Practically, the fate of the scaling laws was entrusted to the discretion of the courts, particularly of the Supreme Court of the United States. The test most frequently used by the Acts in determining the extent of revaluation was the value of the consideration furnished by the Confederate-dollar creditor to his debtor.[75] This doctrine certainly impaired the contracts by substituting for the price negotiated between the parties something like a fair value of the object contracted for. Hence the Supreme

69. 96 U.S. 580, 24 L.Ed. 678 (1878).

70. *Hendry* v. *Benlisa*, 37 Fla. 609, 20 So. 800 (1896); *Burford* v. *Memphis Bulletin Co.*, 56 Tenn. 691 (1872); and other cases cited by Dawson and Cooper 714.

71. 12 Wall. (79 U.S.) 349, 20 L.Ed. 453 (1871).

72. *Supra*, p. 84.

73. Dawson and Cooper 715. Some states lacked any debt-regulation Acts, or the latter were declared invalid by the courts. *Ibid.* 753.

74. The conditions in which those legislatures operated have been described by historians. See 2 Fleming, *Documentary History of Reconstruction* 33 (1907).

75. Dawson and Cooper 732, 747.

Court of Alabama held unconstitutional the Alabama Act which had adopted the "consideration" test;[76] but, in the next year, after reorganization, the court upheld the Act,[77] presenting in addition to *Briscoe* v. *Bank of the Commonwealth of Kentucky*, and the Legal Tender Cases, the third instance of an early reversal by a newly tenanted court of a decision on the constitutionality of a monetary Act. Finally, in 1875, the "consideration" test was held unconstitutional by the Supreme Court,[78] but at that time the process of liquidation and revaluation had practically been completed.

Section 43

GOLD STANDARD AND DEVALUATION

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I. Gold Standard

When by the end of 1878, the gold-paper dualism had come to an end, it was not simply replaced by a bimetallistic system, as provided in the unrepealed law of 1792. Since 1834 silver enjoyed a premium and silver dollars were not in circulation before and during the greenback period. It was but the confirmation by law of existing factual conditions when Congress, by the so-called Coinage Act of February 12, 1873,[1] struck the silver dollar from the list of money to be coined. This meant the end of bimetallism and the statutory establishment of gold as the only standard of the dollar; the simultaneous creation of the short-lived "trade dollar"[2] only gave point to the turn of events.

By a strange coincidence, very soon after the enactment, silver entered its long road of decline, extending over the following decades. Immediately the silver party began its agitation for the reëstablishment of the "dollar of the fathers" with the cry that abrogation of the silver dollar had been accomplished surreptitiously by "the crime of 1873."[3] While the various phases

76. *Kirtland* v. *Molton*, 41 Ala. 548 (1868).

77. *Herbert* v. *Easton*, 43 Ala. 547 (1869).

78. *Wilmington & Weldon R. Co.* v. *King*, 91 U.S. 3, 23 L.Ed. 186 (1875).

1. 17 Stat. 424, § 16.

2. *Supra*, p. 317.

3. § 9 of the Act of Jan. 18, 1837 [5 Stat. 136 at 137], provided "that of the silver coins, the dollar shall be of the weight of 412½ grains; the half dollar of the weight of 206¼ grains; the quarter dollar of the

of the ensuing fight for and against bimetallism and more specifically for and against restoration of the silver dollar, are of greatest political interest, the legally important fact is that free coinage of the silver dollar was never resumed. The silver party succeeded only in having the silver dollar restored to its original standard of 371.25 grains as unlimited legal tender by the Bland-Allison Act of February 28, 1878.[4] Moreover, the Treasury was directed, by this Act and its substitute, the Sherman Silver Purchase Act of July 14, 1890,[5] to purchase and monetize [6] silver in large quantities. The result was a heavily "limping" gold standard. Since the silver dollar was again legal tender it could also be used as "specie" payment on greenbacks and as "lawful money" in the redemption of national bank notes. The increasing business prosperity of the country helped to support the silver load,

weight of 103⅛ grains; the dime. . . ." § 15 of the 1873 Act said instead "that the silver coins of the United States shall be a trade dollar, a half-dollar, or fifty cent piece, a quarter-dollar, or twenty-five cent piece, a dime, or ten cent piece; and the weight of the trade dollar shall be 420 grains troy. . . . [there follow the weights of the other silver coins]; and said coins shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment". Obviously the gap, wrought through the elimination of the silver dollar, was filled by the trade dollar, a novel creation, which was out of place on this score, *supra*, p. 317. The long and verbose Act, containing 67 sections, has no explicit indication of the historically important legislative decision contained in it, the title running innocently "An Act revising and amending the laws relative to the mints, assay offices, and coinage of the United States". Great efforts have been made to show that the bill was given careful attention in Congress and that one or the other of the legislators who later on joined in the battle cry of "Crime of 1873" knew or *should have known* the true meaning of the bill. Hepburn, *supra*, p. 567, n. 3, at 271; McCleary, *The Crime of 1873*, 7 *Sound Currency* 154 (1900). This may be true but the defenders of the legislative proceeding have rather strengthened the impression that the abandonment of bimetallism was only casually touched upon in the debates.

4. 20 Stat. 25, sec. 1, 31 U.S.C. 316. The veto of President Hayes against the bill was overridden. See *Baldwin* v. *Baker*, 121 Mich. 259, 80 N.W. 36 (1899).

5. 26 Stat. 289.

6. By the coinage of silver dollars and the issuance of silver certificates and treasury notes, both backed by, and payable, in silver dollars; the Treasury notes, added by the Sherman Act, were also payable in gold coin at the discretion of the Treasury. The legal status of "Treasury notes, 1890" became very similar to that of United States notes, cf. 31 U.S.C. 401, 408, 408a, 452, 453; for a slight discrepancy of past importance, see 20 Op.Att. Gen. 317 (1892). Treasury notes have long been in the process of withdrawal and cancellation by the Treasury. On June 30, 1949, only $1,145,466 were in circulation.

kept within reasonable bounds by the upright efforts of President Cleveland.[7]

The dangerous silver purchase policy was discontinued in 1893 and definitely abandoned after the failure of the free-silver Presidential campaign of W. J. Bryan in 1896. Ultimately, the so-called Gold Standard or Parity Act of March 14, 1900, provided that "the dollar consisting of 25–8/10 grains of gold 9/10 fine shall be the standard unit of value."[8] The silver dollar remained legal tender but the gold standard was now officially recognized, and it was further strengthened by the redemption of the greenbacks in gold, which was prescribed by the Act. Some "bimetallistic" oddities of language preserved in the legislative texts lacked legal relevancy.[9]

From the Gold Standard Act on, the legal structure of American currency remained undisturbed for a generation. The Federal Reserve Act of December 23, 1913 [10] gave rise to two new types of currency, the Federal Reserve notes and the Federal Reserve Bank notes. The former, discussed earlier in this volume, originally required a gold reserve of 40% and allowed as collateral (beyond the "gold reserve") eligible commercial paper only. The momentous shift to the admission of government obligations as collateral was taken by the Glass-Steagall Act of February 27, 1932,[11] which, through its emphasis on government financing, foreshadowed later developments. From the beginning Federal Reserve notes, like United States notes, were made redeemable in gold at the United States Treasury.[12] Under the influence of the old theory on bank notes, they were not made legal tender, though receivable for all public debts and generally by all Federal Reserve banks, member banks of the Federal Reserve System, and national banks. The Federal Reserve Bank notes infelicitous-

7. See Taussig, *The Silver Question in the United States* (1894).

8. 31 Stat. 45, 31 U.S.C. 314. The customary title "Gold Standard Act" is not the official one, which reads, as follows: "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes." The term "Parity Act" is sometimes found in judicial decisions, e. g., in *Compañia de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland*, 269 N.Y. 22, 198 N.E. 617 (1935).

9. *Supra*, p. 129.

10. 38 Stat. 251. The Act has frequently been amended. Its present version appears from 12 U.S.C. 221 et seq.

11. 17 Stat. 57, 12 U.S.C. 412.

12. Besides, they were redeemable by the banks themselves in "lawful money" including silver dollars.

ly[13] denominated "circulating notes" were legally on the same footing as national bank notes, especially with respect to redemption and receivability.[14] Obligations of the issuing Federal Reserve Banks, they were supposed to replace the national bank notes. Actually, they were used mainly for other purposes and never gained great significance as currency.[15] In 1945 their further issuance was definitely barred.[16]

Prior to the establishment of the Federal Reserve system, critical shortages of circulating media in 1893 and 1907 were to some extent met by clearing houses which temporarily put "clearing house certificates" of small denominations into general circulation,[17] but this fact did not evoke reaction in the legal field.

II. Devaluation [18]

The world monetary crisis crushing in its course one monetary system after the other, reached the United States in 1933. In view of the "heavy and unwarranted withdrawals of gold and currency" from the American banks "for the purpose of hoarding" and considering that "continuous and increasingly extensive speculation abroad has resulted in severe drains upon the Nation's stock of gold"[19] President Franklin D. Roosevelt by a memorable

13. Because the "Federal Reserve notes" were even more designated and fit for circulation.

14. Federal Reserve Act of Dec. 23, 1913, § 16, 12 U.S.C. 441 *et seq.* See also Steiner, "The Federal Reserve Bank note" in *Money and the Law* (ed. by New York University School of Law, 1945) 73.

15. In World War II unused Federal Reserve Bank notes in the amount of $660,000,000 held in store by the Treasury and carrying the inscription "national currency" were employed as reserve for deposits in Federal Reserve Banks and afterwards through ledger transactions transformed into Treasury obligations. This was done to save printing cost and material. The legality of the complicated procedure was at length explained by the Federal Reserve Board, 78th Cong., 1st Sess.; 89 Cong. Rec., Part I 585 et seq.

16. Act of June 12, 1945, § 3, 59 Stat. 238.

17. See Hepburn, *supra*, p. 567, n. 3, at 351, 390; and Andrew, "Substitutes for cash in the crisis of 1907," 22 Qu. Journ. Econ. 505 (1908) [table]. Cf. *Yardley* v. *Philler*, 167 U.S. 344, 17 S.Ct. 835, 42 L.Ed. 192 (1897) discussing clearing-house certificates in general. They were held not to be subject to the 10 percent death tax. 20 Op.Att.Gen. 681 (1893). See also *supra*, p. 582, n. 4.

18. For economic analysis and criticism of the monetary developments since 1933, see Harris, *Exchange Depreciation* (1936); Paris, *Monetary Policies of the United States 1932–1938* (1938); G. Griffith Johnson, *The Treasury and Monetary Policy 1933–1938* (1939); and others.

19. During February, 1933, and until March 6, 1933, $476,100,000 in gold was withdrawn for export and

Proclamation of March 6, 1933, instituted Bank Holidays prohibiting the banks, under penalty, from making payments.[20] At the same time the Treasury of the United States ceased employing gold or gold certificates in any payments whatsoever.[21] Hence, paper money became to all intents and purposes irredeemable. Reopening of the banks was authorized by an Executive Order of March 10, 1933, with the proviso that gold payments must not be made except under authority of the Secretary of the Treasury.[22] Thus reestablishment of banking operations fell short of making gold available to holders of the various types of redeemable notes. Seizure by the government of coins, gold bullion and gold certificates soon followed.[23] Through the discontinuance of gold re-

hoarding from the Federal Reserve Banks and the United States Treasury. Simultaneously the demand for currency for the same purposes increased the circulation of currency by about $1,840,000,000. *Federal Reserve Bulletin*, 1933, 212.

20. Proclamation No. 2039 of March 6, 1933, 48 Stat. 1689, relying on questionable grounds [Act of Oct. 6, 1917, § 5(b), 40 Stat. 411 at 415, 50 U.S.C.A.App. 5(b), a war emergency regulation] but approved of and confirmed by the Emergency Banking Relief Act of March 9, 1933 [48 Stat. 1, 12 U.S.C. 95b] and prolonged under the same Act, by Proclamation No. 2040 of March 9, 1933, 48 Stat. 1691. The haste of the Congressional approval illustrates the urgency and perilousness of the situation. The Congressional enactment was denied the intended retroactivity effect in *Anthony* v. *Bank of Wiggins*, 183 Miss. 885, 184 So. 626 (1938). On the other hand, the President's Order of March 9, 1933 and the Regulations of the Secretary of April 29, 1933 (*infra*, n. 23) were given effect through sound interpretation in *British-American Tobacco Co.* v. *Federal Reserve Bank of New York*, 104 F.2d 652, 105 F.2d 935 (C.C.A.2d, 1939), *cert. denied*, 308 U.S. 600, 60 S.Ct. 131, 84 L.Ed. 502 (1939). See also *United States* v. *Barnard*, 72 F.Supp. 531 (W.D. Tenn. 1947).

21. Instruction of March 6, 1933, by the Secretary of the Treasury, approved by the President; reproduced in the Government brief in *Nortz* v. *U. S.*, 294 U.S. 317, 55 S. Ct. 428, 79 L.Ed. 907 (1935).

22. Executive Order of the President, No. 6073, 31 Code Fed.Reg. 120.3 (1949).

23. The legal history of the nationalization of gold in the United States is somewhat involved. The Emergency Banking Relief Act of 1933, *supra*, n. 20, authorized the President to "regulate or prohibit . . [the] hoarding" of gold coin, certificates, and bullion (48 Stat. 1, § 2, 12 U.S.C. 95[a]), and empowered the Secretary of the Treasury to order the requisition of gold and gold certificates upon payment of an "equivalent amount" of any other form of money (48 Stat. 1, § 3, 12 U.S.C. 248 [n]). Acting thereunder, the President issued requisition orders on April 5 and 20, 1933 (Executive Orders No. 6102, 6111; *Federal Reserve Bulletin* 1933, 213, 266) and the Secretary of the Treasury issued licensing regulations. (Treasury Order, April 29, 1933; *Federal Reserve Bulletin* 1933, 267.) But by an Executive Order of August 28, 1933 (No. 6260; 12 U.S.C. 95a, note), the President

demption, the automatic link between the dollar and gold was cut; the gold standard was abandoned and the dollar began to depreciate. This process, originally forced upon the country through the adverse conditions mentioned by the President was afterwards, to a certain extent, welcomed and promoted by the Government as a measure of policy to relieve the debtor class and enhance the price level.[24] The question whether devaluation of the dollar was wrought by deliberate action of the government can be answered both in the affirmative and in the negative. While abandonment of the gold standard was inevitable, the degree of the dollar's depreciation was chiefly determined by voluntary action of the government.[25]

replaced his previous decrees, though retaining existing liabilities thereunder, with one imposing criminal penalties for continued hoarding, thus changing the ostensible method from direct requisition to prohibition of hoarding. The purpose of this procedure, which actually did not change the law, was probably to forestall any question of exceeding the powers granted to the President under § 2 of the Emergency Banking Relief Act. Moreover, nationalization was extended to gold hoarded in the United States by non-residents. Still in the case of *United States* v. *Campbell*, the Presidential Order of August 28, 1933 was invalidated insofar as it imposed criminal penalties for failure to deliver gold to the Treasury. (5 F.Supp. 156 [S.D.N.Y.1933]); for discussions of the *Campbell* case see Note, 47 Harv.L.Rev. 479 (1934); 34 Col. L.Rev. 166 (1934); 43 Yale L.J. 497 (1934). The court, after a verbose discussion of other matters, briefly disposed of the case on the ground that the Act of 1933 empowered only the Secretary of the Treasury, and not the President, to requisition gold (i.e., to act *in rem*); the fact that the Treasury Regulations themselves covered the field was by an utterly strained argument considered to be immaterial inasmuch as they did not refer to the proper statutory provision. The difficulty was removed by subsequent requisition orders of the Secretary of the Treasury (Treasury Orders of December 28, 1933 and of January 15, 1934; *Federal Reserve Bulletin* 1934, 9 and 79) directly issued pursuant to § 3 of the Act of 1933.

A delivery of gold certificates under these orders gave rise to the *Nortz* case, *supra*, p. 288.

24. See Paris, *supra*, n. 18, at 15; Johnson, *supra*, n. 18, at 18. The Attorney General described the general objective of the financial part of the New Deal as "to create employment, to augment buying power, to increase and stabilize domestic prices." 37 Op.Att.Gen. 344, 350 (1933).

In *Nye* v. *Schwab*, 58 Ohio App. 422, 16 N.E.2d 783 (1938), the defendant, a mortgagor, asserted that the legislative policy of depressing the purchasing power of the dollar and giving relief to the debtor class was "wrongfully" and "corruptly" thwarted by the Federal Reserve System in conspiracy with the "money lenders." The defendant, relying on the law of usury, demanded therefore a reduction of his debt. The court pointed out with great care the immateriality of the confused defense.

25. App. Hamburg, Nov. 12, 1936, called the devaluation of the

During the period of experimentation and fluctuation, a preparatory step toward stabilization was taken by the "Thomas Amendment" to the Agricultural Adjustment Act which made all coins and paper moneys of the United States legal tender.[26] The President was given power to reduce the weight of the gold dollar for the stabilization of domestic prices and the protection of the country's foreign commerce against foreign currency depreciation, but not more than 50% of its prior (1837) value. The incorporation of basic monetary norms into an agricultural statute is noteworthy in itself; it brings home their purpose to help the farmer through depreciating the dollar.

When the President by his Proclamation of January 31, 1934,[27] fixed the weight of the gold dollar to be 15-5/21 grains 9/10 fine, devaluing it to 59.06% of its former gold parity, he established thereby a new parity corresponding to a price of $35 for one ounce of fine gold. The day before Congress had passed the Gold Reserve Act [28] which definitively discontinued the minting of gold coins and ordered the reshaping of gold coins into bars. The same Act created the Stabilization Fund and vested the gold held by Federal Reserve Banks in the United States; the banks received as compensation dollars at the new parity, the devaluation profit accruing to the Treasury. Through these measures the American monetary system was reconstructed on a level 40.94% below the previous one.[29] While the "Thomas Amendment" also authorized the President to provide for unlimited coinage of silver at a definite gold-silver ratio to be fixed by him—that is, to introduce bimetallism—this amazing plan was to all intents and purposes abandoned in 1938,[30] but the silver party had succeeded in imposing upon the nation the burden of the Silver Purchase Act of 1934, compelling the Government to buy continually domestic silver at high cost.[31] The Act, besides introducing a distorted conception of

dollar an "artificial measure of monetary technique." Sack und Meyer-Collings, *Gold- und Valuta-Klausel* (1937) 133, 137.

26. Act of May 12, 1933, Title III, § 43, 48 Stat. 31, 52.

27. Proclamation No. 2072, 48 Stat. 1730, 31 U.S.C.A. 821 note.

28. 48 Stat. 337, 31 U.S.C. 315b, 440 et seq. Regarding transactions in gold. See the Treasury's Gold Regulations of 1937, 31 Code Fed. Reg. (1949) Part 54.

29. On the expiration of the President's power further to devalue the dollar and the controversy related thereto see *supra*, p. 122.

30. On April 28, 1938, the Secretary of the Treasury revoked his Order of June 28, 1934, which was related to unlimited coinage of silver. 3 Fed.Reg. 998.

31. *Supra*, p. 70, The Act also gave the President power to requisition silver. This provision was used to some extent by the Executive Order of August 9, 1934, No. 6814,

"monetary value",[32] led to a dominant position of silver certificates in the currency.[33] Nevertheless the Act has little significance from the angle of monetary law; essentially it means the appropriation of public funds to certain private interests—a political measure.

The new monetary order amounted to a marked rise of the government's monetary position. The main phases of this process were the transfer of the gold holdings of the Federal Reserve Bank to the Government, the introduction of Government securities as collateral for Federal Reserve notes, the retirement of national bank notes—the last pillar of privately issued paper money—and the institution of the Stabilization Fund. Simplification was a secondary and desirable effect of governmentalization. In addition to the elimination of national bank notes, and the retirement of Federal Reserve Bank notes, the disappearance of gold certificates from circulation was an important fact in this respect. Finally, the tie between money and metal was greatly loosened through discontinuance of gold redemption, through the changed nature of the gold certificate and through the specious character of the redemption of silver certificates.

To sum up, the present monetary system was built up during the early years of the Roosevelt administration. The inflation caused by World War II has so far resulted only in one major enactment on currency—the passage of the Reserve Ratio Act of 1945,[34] which among other things reduced the gold reserve for Federal Reserve notes from 40% to 25%. Much more important are the recent developments in the international area which have already been described.

revoked by Executive Order of April 26, 1938, No. 7877, 3 Fed. Reg. 842 (1838). In 1933 the Government had also tried to support the silver market by a treaty with a number of other countries, 48 Stat. 1723, 1879. Moreover, prior to the Silver Purchase Act, the Attorney General had taken the view that the President had power to put into effect a plan for the unlimited coinage of domestic silver, 37 Op.Atty.Gen. 344 (1933). On the highly questionable legal procedures used before the enactment of the Silver Purchase Act See Carothers and Bradford, "Legal aspects of silver policies of the United States in recent years," in *Money and the Law* (ed. by New York University School of Law, 1945) 43 and generally. Murad, *The Paradox of a Metal Standard* (1939); Westerfield, *Our Silver Debacle* (1936), and Hütter, *La Question de la Monnaie d'Argent dans les Etats-Unis* (1938).

32. *Supra*, p. 70.

33. *Supra*, p. 92.

34. Act of June 12, 1945, § 1(a), 59 Stat. 237, 12 U.S.C. 413.

III. Retrospect

In a little more than three centuries this country has passed through a stupendous monetary evolution. Starting from conditions of primitive society, highlighted by the use of wampum and other barter currency, it has in rapid and often violent movements back and forth grown into the most elaborate and powerful monetary system ever known. The pace of events is indicated by the fact that only seventy years after the Plymouth landing, the settlers produced the first paper money in the western world. Throughout the centuries the unique multitude of monetary forms bear witness to the vigor and resourcefulness of the American people. We have seen, in addition to the various types of barter currency, private gold coins;[35] legal tender depending upon weight;[36] foreign coin and domestic trade coins which were legal tender;[37] bimetallistic, single and dual standards;[38] successful paper money embodying claims for tobacco;[39] government notes adapted to fluctuations of commodity prices;[40] "currency" bearing interest;[41] Federal bank notes and State bank notes existing side by side;[42] paper money exchangeable for bonds;[43] parallelism of paper money redeemable exclusively in gold coins and redeemable exclusively in silver coin;[44] successful local resistence against *cours forcé* of paper money;[45] banks of issue hiding in the woods;[46] postal stamps as currency,[47] and all sorts of vicious paper money.[48]

The share of the common people in monetary developments is evident everywhere. It accounts for the inflationary undercurrent in American history which sometimes wrought disaster but was successful at other times, and, in any event, has not appreciably retarded the steady and mighty uprise of the country. The democratic element, or to put it differently, the active interest, coaction and pressure of the people appear most characteristically in the role which the monetary problems have played in party programs, propaganda and elections. Phenomena such as the

35. *Supra*, p. 576.
36. *Supra*, p. 49.
37. *Supra*, pp. 556, 594.
38. *Supra*, pp. 571, 586, 596.
39. *Supra*, p. 562.
40. *Supra*, p. 29, n. 33, p. 215, n. 61.
41. *Supra*, p. 75.
42. *Supra*, p. 579.
43. *Supra*, p. 583.
44. Gold certificates, Federal Reserve notes and United States notes up to 1933 on the one hand; silver certificates, on the other.
45. *Supra*, p. 585.
46. *Supra*, p. 577.
47. *Supra*, p. 583.
48. Continentals, certain state bank notes, clearinghouse certificates, etc.

Greenback Party and Bryan's silver campaign would have been unthinkable in any other country. Consequently, in the United States monetary measures have taken on much more the form of legislation than of administrative action. Generally speaking, the potency of the legal factor in American monetary history is quite unusual. In the Colonial period the constitutional conflicts with the home government are conspicuous. In later times our attention is preeminently attracted by judicial developments. They gave us such great documents as Chief Justice Marshall's opinion in *McCulloch* v. *Maryland*, of Mr. Justice Story in *Briscoe* v. *Bank of the Commonwealth of Kentucky*, and of Mr. Justice Strong in the Legal Tender Cases. In the pleadings of the parties, and, more impressively, in the opinions of the courts, the divisive monetary issues which frequently reflect political differences are crystallized and brought into sharp focus. As a matter of fact, powerful dissenting opinions have been the rule in monetary cases. In this sense it may be said that the legal material brings into relief the essential features and the moving forces of American monetary history. At the same time the wealth of monetary forms, the significance and dramatic character of the conflicts, and the wisdom laid down in judicial opinions make American monetary history a source of instruction far beyond the frontiers of this country.

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